

KU LEUVEN

FACULTY OF LAW

Academic year 2015 – 2016

**Freeze-outs of minority shareholders:  
a comparative law and economics approach**

Supervisor: M. WYCKAERT

Master thesis, submitted by

Tom VOS

As part of the final examination for

the degree of

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# Abstract

*Because minority shareholders can be an undue burden and even a nuisance when running a company, a controlling shareholder may want to freeze them out. The question arises to what extent the law should allow such freeze-outs and under which conditions. Different countries answer this question differently. In general, the approach in the United States is much more flexible than in Europe. However, up till now, there has been little literature that compares freeze-outs in the United States and in European countries. At the same time, the (mainly American) law and economics literature has suggested that a flexible regime for freeze-outs might be beneficial for society by addressing a free rider problem and a holdout problem in the market for corporate control, but these insights are rarely integrated into European legal thinking.*

*This master thesis aims to fill these gaps. It will endeavour to determine what constitutes an efficient legal framework on freeze-outs by using a “comparative law and economics approach”. First, the situation in the United States is compared with the situation in Europe in general and the Netherlands and Belgium in particular. Then, these legal systems are evaluated using the criterion of economic efficiency. Finally, some suggestions are made to come to a more efficient legal framework on freeze-outs. The goal of the research is to reopen the debate in Belgium and Europe on the desirability of freeze-outs.*

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# Introduction

## Problem outline

1. **Situation outline**. The present master thesis concerns the topic of “freeze-outs of minority shareholders”. Consider the following example: company A launches a public takeover bid for a listed company B with the goal of acquiring all shares of company B and integrating it in the company A group. The board of directors of company B approves the bid and most of the shareholders of company B sell their shares to company A. However, some minority shareholders of B consider the bid too low and do not want to sell their shares to company A at the price offered by A. The question then arises: can company A force the minority shareholders to transfer their shares to him? Whose interests will take preference: those of company A, the controlling shareholder, or those of the minority shareholders?
2. **Terminology: “Freeze-out”.** The example above is what we understand as freeze-outs in this master thesis. A “freeze-out” is defined by this master thesis as “*any legal technique that allows a controlling shareholder to take full control of the business of the target company without having the burden of minority shareholders*”. A “*majority shareholder*” or *“controlling shareholder*”[[2]](#footnote-2) is understood as the shareholder or group of shareholders that controls the company, while “*minority shareholders*” are defined as the shareholders other than the controlling shareholders of the company. *“Control”* is understood in the meaning of article 5 of the Belgian Companies Code: *“the competence in law or in fact to exercise a decisive influence on the appointment of the majority of the directors or on the orientation of the company policy”.[[3]](#footnote-3)* Owning a majority of the shares is assumed to give control, but is not per se necessary to have control (cfr. article 5 §2 Belgian Companies Code).

Even though the term “freeze-out” is used mainly by American authors and sometimes has a slightly negative connotation, it will be used throughout the present study as a neutral term that functions as a *tertium comparationis*. In Europe, the term “squeeze-out” is commonly used. However, this term is strongly associated with the statutory squeeze-out procedure of the Takeover Directive, and normally does not refer to alternative freeze-out techniques such as a merger or sale of all assets (discussed further in chapter 2). Therefore, this master thesis will use the term “freeze-outs” as an umbrella term for all these different techniques.

Finally, this master thesis uses the terms “tender offer” (which is more common in the United States) and “takeover bid” (which is more common in Europe) interchangeably, as they mean the same. It should also be noted that in the United States the verb “to tender” means “to accept a tender offer” in this context.

1. **Freeze-out techniques.** Many different legal techniques can function as freeze-out techniques, such as a statutory squeeze-out procedure, an (American style) cash merger, a regular stock merger or a sale of all assets.[[4]](#footnote-4) An overview of the various freeze-out techniques is given in chapter 2, followed by a detailed discussion of freeze-outs per jurisdiction in the next chapters.
2. **Rationale of freeze-outs**. The question arises why a majority shareholder would want to acquire 100% of the shares in the target, rather than just 50% or 75%. There are several reasons for this, which are especially relevant for larger listed companies, which will be the focus of this master thesis.[[5]](#footnote-5) First, if a majority shareholder acquires all shares, certain formalities concerning the general assembly of shareholders are no longer necessary, which can save a lot of time and costs. Second, the target company can be delisted and no longer has to comply with the various obligations and ensuing costs of a stock exchange listing, such as the disclosure duties and the rules on insider trading. A delisting also allows the company to pursue long-term projects, rather than being pressured into achieving short-term results. Third, the majority shareholder will have more freedom in setting out the company’s policy, for example on the dividend policy or intra-group transactions, as he will no longer need to take into account the interests of a minority shareholder. This also eliminates a major litigation risk and allows the majority shareholder to fully integrate the company into its group. Fourth, some tax and accounting rules are only applicable if the subsidiary company is held for 100%. Finally, for all these reasons, minority shareholders have a certain “nuisance value” [[6]](#footnote-6) to the majority shareholder, who would be willing to push them out. Because it is almost impossible for a bidder to acquire all shares through a takeover bid[[7]](#footnote-7), freeze-outs are needed for this.
3. **Recent delistings in Belgium.** The relevance of the topic of freeze-outs for Belgium has recently been emphasized, with a wave of companies that seek a delisting. In a recently short period of time, Pairi Daiza, CMB and Spadel all wanted to end their listing and “go private”.[[8]](#footnote-8) In such cases, it is often impossible to acquire all shares and some form of freeze-out will be necessary to acquire sufficient shares to end their listing. Of course, then the interesting question is at what threshold of share ownership and with which procedural protection the minority shareholders can be frozen out by the majority shareholder.

## Current state of the literature

1. **American vs. European approach to freeze-outs.** The legal regime on freeze-outs has received much attention in the United States and (to a slightly lesser extent) in Europe. There are substantial differences between the American and the European approach. In general, the law in the United States is much more flexible than in Europe. Indeed, freeze-outs are available at a much lower threshold in the United States than in Europe. However, there has been an interesting development in the case law in the Netherlands that allows mergers to be used as a freeze-out technique, indicating that the legal regime in the Netherlands is also becoming more flexible.
2. **Gap in comparative legal literature**. While these legal regimes as such are sufficiently studied in the legal doctrine of their respective countries, there has been little literature that fundamentally compares the very different approach to freeze-outs in the United States and in European countries. Admittedly, the study of Ventoruzzo[[9]](#footnote-9) compared the law in the United States with the law in Europe, but it did not study the national law of the European member states in depth, despite the interesting developments in the case law on freeze-out mergers in the Netherlands.
3. **Law and economics literature on freeze-outs.** These different approaches in the United States and Europe also raise the question how these differences can be explained and evaluated from the perspective of economic efficiency. A simple way of looking at these differences is to consider them as the result of the differing importance that countries attach to protecting the interests of minority shareholders. Indeed, the law on freeze-outs has to strike a balance between the interests of majority shareholders in reducing costs of running the company (efficiency) and the interests of minority shareholders in retaining property of their shares (protection of minority shareholders). In this view, the question is about the second agency problem in corporate law, the conflict between majority shareholders and minority shareholders.[[10]](#footnote-10) This looks like a zero sum game: what one actor (i.e. the majority shareholders) wins, the others (the minority shareholders) lose.

However, a more sophisticated economic analysis of freeze-outs reveals that there is more to this problem than meets the eye. The law and economics literature suggests that freeze-outs are also crucial to an efficient functioning of the market for corporate control.[[11]](#footnote-11) In the absence of freeze-outs, shareholders would have an incentive to refuse to tender their shares in a preceding takeover bid, even if they prefer the takeover bid to succeed, to free ride on the profits that they assume the bidder will make (free rider problem) or to extract a higher price from the bidder (holdout problem). These issues suggest that freeze-outs might not only be about balancing the interests of two competing actors, but that allowing freeze-outs can also be beneficial for minority shareholders as a category. Indeed, minority shareholders have an interest in an efficient market for corporate control that can monitor directors (first agency problem).[[12]](#footnote-12)

1. **Gap in law and economics literature.** There is a lot of literature in law and economics on freeze-outs, but these insights are rarely integrated into European legal scholarship, probably due to the fact that these studies mainly use abstract, technical and mathematical economic models and models based on American law.[[13]](#footnote-13)
2. **Conclusion.** In conclusion, there has been a lot of literature on the topic of freeze-outs. However, what is missing from literature is a study that integrates the various insights from law and economics into a thorough comparative and evaluative study on the different legal systems.

## Research objective

1. **Research objective.** The objective of this master thesis is to fill this gap in the literature on freeze-outs. The American approach to freeze-outs will be compared to the European approach in general, and to Belgian law and Dutch law in particular. Then, these different legal systems will be evaluated against the criteria of economic efficiency. Finally, on the basis of these insights, some suggestions are given to come to a more efficient legal framework on freeze-outs in Europe. To be clear, the objective is not to design a draft version of a new statute on freeze-outs. Rather, the objective is to make some suggestions for the main principles, and to start a debate on these principles.
2. **Scope of the research.** This research will be limited to freeze-outs in listed companies. We will only study the company law aspects of freeze-outs. More specifically, we will focus on the fiduciary duties of the directors and controlling shareholders, and not on the formalities of the different freeze-out procedures. We will also keep away from the aspects of securities law, such as the rules on disclosure and on takeover bids. Of course, these aspects are also very important, but they can be isolated from the company law aspects.

In addition, we will not address freeze-outs in private (non-listed) companies. The context is different in non-listed companies, as shareholders are no pure financial investors and are often involved in the management of the company. In addition, the concept of freeze-outs could conflict with the *“geschillenregeling”* (dispute settlement procedure) in Belgian and Dutch company law, which follows another logic based on the resolution of conflicts between shareholders. Freeze-outs, on the other hand, are based on objective conditions, such as a certain threshold of shares.[[14]](#footnote-14)

Finally, exit rights of minority shareholders, such as a sell-out right, a mandatory reopening of the bid or a mandatory bid rule, will not be discussed in this research, except briefly when also relevant for freeze-outs.

1. **Relevance.** By integrating insights from American law and from law and economics into European legal scholarship, this master thesis wants to restart the academic debate on freeze-outs in Europe. The study will also be useful for countries that are planning a reform of their corporate law, such as Belgium at the moment under impulse of the *Belgisch Centrum voor het Vennootschapsrecht (BCV)*.[[15]](#footnote-15) Finally, a reform of the law on freeze-outs could also occur through a change in legal practice and case law, as occurred in the Netherlands. Hence, this study will be useful for practising lawyers and courts, by providing them with legal and economic arguments in cases concerning freeze-outs.
2. **Originality.** As is probably the case with every piece of scholarly legal writing, some parts of this master thesis will be a mere overview of the current doctrine and case law, while other parts will contain more original thoughts. In this master thesis, especially chapters 7 and 8 on the comparative and the economic analysis of freeze-outs will be largely original. The preceding chapters that merely describe the law on freeze-outs in each country will be necessary, however, to understand these more original chapters. This is especially true since freeze-outs are a rather technical and unfamiliar topic for most European corporate lawyers. Finally, the present master thesis will also be original in bringing together the various building blocks that have been discussed previously in existing literature, as an overview on freeze-outs is currently lacking.

## Research questions

1. **Main research question.** From the research objective described above, the following main research question is derived: *What constitutes an efficient legal framework on freeze-outs of minority shareholders in listed companies in Europe?* The concept of efficiency will be operationalized further in the methodology section.
2. **Sub research questions.** As the main research question is a normative question, several sub research questions are needed to answer the main research question:

* What is the law on freeze-outs in the United States? (descriptive)
* What is the law on freeze-outs in Europe (Merger Directive, Takeover Directive and case law of the European Court of Human Rights)? (descriptive)
* What is the law on freeze-outs in the Netherlands? (descriptive)
* What is the law on freeze-outs in Belgium? (descriptive)
* What are the similarities and differences in the law on freeze-outs between the United States one hand and the European Union, the Netherlands and Belgium on the other hand? (comparative)
* How can these similarities and differences be explained? (explanatory)
* Are these legal systems economically efficient? (evaluative)

The choice of jurisdictions will be justified further in part 1.5.2 of the methodology section.

## Research method

### The comparative law and economics approach

1. **Comparative law and economics.** This master thesis will combine the methods of functional comparative law and of law and economics, aligning itself with the tradition described as “comparative law and economics”[[16]](#footnote-16) and with the “comparative and functional approach” used in *The* *Anatomy of Corporate Law*[[17]](#footnote-17)*.* There is a close connection between the functionalist method of comparative law and law and economics, because both look at the societal needs that legal rules fulfil and have a “non-state-centric approach”.[[18]](#footnote-18)

The added value of combining comparative law and law and economics is that comparative law helps to describe real life legal rules, rather than theoretical or abstract ones, while law and economics gives comparative law the tools to explain and to evaluate legal rules.[[19]](#footnote-19) The difference of the comparative law and economics approach (as used in this master thesis) with traditional law and economics is that it is more sensitive to the particularities and complexities of each legal system.[[20]](#footnote-20)

1. **Passive interdisciplinarity.** It should be noted that the method of law and economics will only be used passively: rather than developing its own model, this research will use previous findings from the law and economics literature and use them to evaluate current legal systems and to design an ideal framework.
2. **Three step approach.** In this research, the comparative law and economics approach to answer the normative research question is operationalized into three steps: a comparative step, an evaluative step and a normative step.

### Comparative step

1. **First step.** In the first step, the research will describe the law on freeze-outs in the selected jurisdictions (the United States, the European Union, the Netherlands and Belgium) and compare and explain the differences and similarities between the different legal systems.
2. **Selection of jurisdictions.** Belgium is selected because it is the home jurisdiction of the researcher. The Takeover Directive[[21]](#footnote-21) and the Merger Directive[[22]](#footnote-22) of the European Union were included in this master thesis because they constitute a (partly) harmonized regime for freeze-outs. By studying these mechanisms at the EU level, the findings of this research can be generalized to other European countries. A similar reasoning applies to the case law of the European Court of Human Rights on freeze-outs.

The United States were selected because they have a well developed system of freeze-outs that is very different from that in the EU as it is much more “liberal”. This could be seen as a “most different case” logic.[[23]](#footnote-23) However, only Delaware corporate law will be studied, as this legal system is the most developed and more than half of the listed companies in the United States are incorporated there.[[24]](#footnote-24)

In addition, the Netherlands were selected because their legal regime on mergers is formally very similar to that of Belgium and the rest of the European Union. However, the recent *Versatel* case law has allowed mergers to be used as a freeze-out technique. This raises the interesting question whether mergers can also be used to that end in other countries of the European Union. Therefore, the Netherlands are a good test case for the development of the law on freeze-outs in the rest of the European Union. This could be seen as a “most similar case” logic.[[25]](#footnote-25)

Finally, it was decided not to include the United Kingdom and Germany in the selected jurisdictions, despite the fact that they also have an interesting technique to freeze out minority shareholders (respectively schemes of arrangement and enterprise agreements[[26]](#footnote-26)), because this was considered not feasible in the context of a master thesis. The justification for this choice is also that these techniques are not often used for freeze-outs and that they are very specific for the country, so that generalization is more difficult than for the Netherlands.[[27]](#footnote-27) Other European countries are not studied because it is assumed that they possess a similar legal framework, due to the harmonisation on the basis of the Takeover Directive and the Merger Directive and due to the fact that the European literature does not mention any other countries that possess a notably different regime. Non-European countries (other than the United States) are not studied, as the societal context is probably too different to draw interesting conclusions for Europe and because a scan of the literature did not reveal any specificities that could prove useful for this research.

1. **Functionalist method.** In this research, a version of the functionalist method[[28]](#footnote-28) will be used for the comparative part, taking into account the various critiques on this method[[29]](#footnote-29). This research will apply this method by comparing the (economic) function of freeze-outs in the different legal systems, regardless of which technique is used for the freeze-out.

Zweigert and Kötz have also suggested that there is a presumption that a societal problem is solved in a way that leads to the same outcome in practice (the infamous *praesumptio similitudinis*)[[30]](#footnote-30), but this has been severely criticized in the literature.[[31]](#footnote-31) This research will not follow this presumption, nor will it only focus on similarities or differences. Rather, it will try to balance both. For example, the differences between the legal systems of the European Union and the United States will be analysed, as this could lead to an insight of which system constitutes the “best” legal system.

1. **Taking into account the societal context.** The functionalist method prescribes that comparative research should take into account the societal context in each jurisdiction.[[32]](#footnote-32) There are several differences in the societal context that can prove relevant when comparing the law on freeze-outs in the United States and Europe. First, capital markets are less developed in Europe: there are less listed companies and there is less liquidity on the markets.[[33]](#footnote-33) Second, the shareholder structure in (continental) Europe is mainly concentrated, while the United States has a predominantly dispersed shareholder structure.[[34]](#footnote-34) Third, procedural rules, a “plaintiff’s bar” and other variables[[35]](#footnote-35) lead to a more litigation-friendly society in the United States. This is also associated with a higher reliance in the United States on “*ex post* standards strategies”, in contrast with the “*ex ante* rules strategies” in Europe.[[36]](#footnote-36) Finally, shareholders are (mainly) viewed in Europe as holders of property rights, while in the United States shareholders are viewed as financial investors.[[37]](#footnote-37)

### Evaluative step

1. **Second step.** Comparative law alone cannot be used for evaluating legal systems or answering a normative question.[[38]](#footnote-38) Therefore, in the second step, the different legal systems will be analysed using the evaluative criterion of economic efficiency.
2. **Economic efficiency.** Economic efficiency is operationalized as Kaldor-Hicks efficiency.[[39]](#footnote-39) This entails that wealth for society as a whole is maximized and that the losses suffered by the “losers” can be (not: will be) compensated by the benefits of the “winners”. This criterion is more fit for this research than the traditional “Pareto criterion”, which holds that nobody can be made worse off by a legal rule. The problem with the Pareto criterion is that legal rules almost always make somebody worse off, for example the minority shareholders that are frozen out. Kaldor-Hicks efficiency is translated to the context of takeovers as the “sole owner standard” or as “undistorted choice” (see further in the chapter 8 on the economic analysis of freeze-outs).
3. **Assumptions.** The method of law and economics, and therefore also this research, makes use of several important assumptions.[[40]](#footnote-40) First, the law is regarded as an instrument that can alter human behaviour to solve societal problems. Second, it is assumed that corporate law should be primarily economically efficient. Finally, the research will use the classic economic assumption of the *homo economicus*: people are rational utility maximizers with stable preferences. Although this idea of a “*homo economicus*” has been refuted by psychology, it can still be considered a good tool to predict tendencies in human behaviour.[[41]](#footnote-41) It was decided not to include the perspective of behavioural law and economics, as there currently is no literature from this field on freeze-outs, and it would fall outside the scope of this master thesis (and the current abilities of the author) to develop an original framework from this perspective.

### Normative step

1. **Third step.** In a final step, this master thesis will try to establish the main principles of an efficient legal framework for freeze-outs in Europe. The answer to this normative question will be based on the insights from the comparative and economic analysis of freeze-outs.
2. **Fairness?** An important assumption in this master thesis is that (corporate) law should be primarily economically efficient.[[42]](#footnote-42) We acknowledge that a concept like “fairness” can impose some limits on an economically efficient law. Nevertheless, we believe that our suggestions for an efficient legal framework are not unfair. A full-blown philosophical analysis would be useful to determine whether this is true and whether an efficient legal framework for freeze-outs is also the best legal framework from a societal perspective. However, it was decided not to include such an analysis in this master thesis and to focus on efficiency, as doing otherwise would not be feasible in the context of a master thesis.

## Roadmap

1. **Descriptive chapters.** This master thesis proceeds as follows. Chapter 2 gives a broad overview of the possible freeze-out techniques in general. Then, the legal regimes on freeze-outs in the selected jurisdictions are studied separately in detail. First, chapter 3 discusses the law on freeze-outs in the United States. Chapter 4 studies the legal regime in the European Union: the Merger Directive, the Takeover Directive, the implementation of these directives in Belgian and Dutch law, and the case law of the European Court of Human Rights on the right to property in article 1 First Protocol of the European Convention on Human Rights (hereinafter “FP ECHR”). Next, chapter 5 and 6 discusses how mergers and other alternative techniques can be used to freeze out minority shareholders respectively under Dutch law and Belgian law.
2. **Comparative chapter.** After these more descriptive chapters, this master thesis becomes more innovative. In chapter 7, the American approach to freeze-outs is compared with the European approach. We will also look at how Dutch law is moving away from the European approach towards the American approach. This chapter also tries to explain these different approaches.
3. **Evaluative and normative chapter.** Next, chapter 8 evaluates these differences against the criterion of efficiency, relying on the economic analysis of law. It also makes some suggestions to answer what constitutes an efficient legal framework on freeze-outs, based on the insights from the comparative and economic analysis. We will mostly stick to the general principles, but some concrete proposals will also be offered to get the debate going. Finally, chapter 9 concludes and brings together the insights from the comparative and economic analysis, and gives an overview of the suggestions for an efficient legal framework on freeze-outs.
4. **Citation of sources.** Concerning the practical matter of citation of sources, this master thesis applies in principle the Flemish system of *“Verwijzingen en Afkortingen”* (V&A), with certain changes due to the translation to English. This is also the case for foreign literature. However, for cases from the United States, the American method of case citation was followed, because this makes it much easier to find these cases. All of the American cases discussed can be found on WestLaw.

There are some abbreviations that are especially relevant for the citation of American cases: “A.2d” and “A.3d” refer respectively to the Second Series and Third Series of the “Atlantic Reporter”, which reports cases from (amongst others) Delaware. The abbreviations “Del.” and “Del. Ch.” refer respectively to the Delaware Supreme Court and the Delaware Chancery Courts, the two courts that are relevant for Delaware corporate law. Finally, it should be noted that American cases are cited in full when first introduced, but are thereafter only referred to by way of the name of one of the parties, as is customary in American legal doctrine.

# Freeze-outs in general

## Classification into types of freeze-outs

1. **Overview.** In this chapter, we will discuss some general considerations about freeze-outs. We will classify freeze-outs into different types and will discuss the most used freeze-out techniques. We will use examples and figures to illustrate the different freeze-out techniques. We will keep it to a general introduction of the techniques, without going into details of each legal system. The idea is that the reader should have a general idea of the possibilities for freeze-outs, before we study the technicalities of these techniques in depth in the other chapters.
2. **Post-acquisition freeze-outs.** We will classify freeze-outs in two basic types, post-acquisition freeze-outs and going private freeze-outs.[[43]](#footnote-43) The first type in our classification is the post-acquisition freeze-out[[44]](#footnote-44). This concerns the situation where an independent bidder who has no control over the target company launches a takeover bid on the company. Presumably, not all shareholders have accepted the bid and the bidder now wants to freeze out the remaining minority shareholders.[[45]](#footnote-45) In essence, this type of freeze-outs consists of an at arm’s length[[46]](#footnote-46) tender offer, immediately followed by a freeze-out.
3. **Going private freeze-outs (one-step or two-step).** The second type of freeze-outs is the going private freeze-out. In this situation, a controlling shareholder has had control over a listed company for some time, but now wants to “go private”: delist the company and become its sole shareholder.

There are two basic modalities that a going private freeze-out can take.[[47]](#footnote-47) The controlling shareholder could apply one of the freeze-out techniques that will be discussed below to immediately freeze out the minority shareholders (the so-called “one-step going private freeze-out” or simply the “one-step freeze-out”). Alternatively, the controlling shareholder could first launch a tender offer on the minority shares to try to acquire as many shares as possible, after which the controlling shareholder freezes out any remaining minority shareholders (the so-called “two-step going private freeze-out” or simply the “two-step freeze-out). The reason why a controlling shareholder might opt for a two-step freeze-out rather than a one-step freeze-out is that these are often subject to a more flexible legal treatment (see further in part 3.5.3 concerning the United States, in paragraph 133 concerning the Netherlands and paragraph 135 concerning Belgium).

1. **Consequences of the classification.** The reason why this master thesis makes this classification of freeze-outs is that it has been argued that the different types should follow a different legal treatment. Indeed, Brudney & Chirelstein[[48]](#footnote-48) and Greene[[49]](#footnote-49) have argued that since post-acquisition freeze-outs are preceded by an at arm’s length transaction, the law should be more flexible in allowing them. On the other hand, going private freeze-outs are effected by a controlling shareholder and hence are a form of self-dealing, which led these authors to propose a stricter legal regime for this type.[[50]](#footnote-50) Finally, there has also been quite some debate in the United States on whether the two modalities of the going private freeze-out (the one-step freeze-out and the two-step freeze-out) should be treated the same by the law. This topic is discussed further in part 3.5.3.

## Overview of freeze-out techniques

### Introduction

1. **Overview of freeze-out techniques.** The techniques discussed in the paragaphs below can be used to freeze out minority shareholders[[51]](#footnote-51), either after an independent tender offer (a post-acquisition freeze-out) or as part of a going private operation (a one-step or two-step going private freeze-out). In the examples and figures below, we will work with cases concerning a post-acquisition freeze-out, although the techniques work just as well for going private freeze-outs.

### Squeeze-out

1. **Technique.** Perhaps the most obvious technique to freeze out minority shareholders, at least in Europe, is to make use of the statutory “squeeze-out” procedure that exists in all member states of the European Union. The Takeover Directive makes a post-takeover bid squeeze-out procedure mandatory for member states of the European Union. However, most member states also have a “stand-alone squeeze-out procedure” that can be used outside the situation of a takeover bid (see further in chapter 4). The squeeze-out technique allows a majority shareholder that has surpassed a certain threshold of shares (usually set by domestic law between 90 and 95%), to force the remaining minority shareholders to transfer their shares to him, in return for the fair value of their shares in cash.
2. **Example.** For example,company A wants to acquire full ownership of company B and launches a takeover bid (“TOB”) on its shares (step 1). Most of the shareholders sell their shares to company A (which now holds 96% of the shares), but some of the shareholders of company B decide to hold on to their shares (step 2). Therefore, company A makes use of the squeeze-out procedure to acquire 100% of the shares, while the minority shareholders of B are left with the fair value of their shares in cash.

A

B

B-shareholders

TOBN

Step 1

A

B

B-shareholders

Step 2

4%

96%

A

B

B-shareholders

Step 3

100%

Cash

*Figure 1. Squeeze-out as a freeze-out technique.*

### Cash merger

1. **Technique.** The United States does not have a statutory squeeze-out procedure, as is the case in Europe. However, in the United States, a similar result can be reached with a “cash merger”: after the takeover bid, the target and the bidder merge into each other, and the minority shareholders receive cash instead of shares in the surviving entity. The advantage of this approach is that the threshold for a merger is only 50% of outstanding shares, which is considerably lower than the threshold for squeeze-outs in Europe. Cash mergers are not possible in Europe (see further in paragraph 124).
2. **Example.** For example, company A again wants to acquire full ownership of company B. For this reason, it establishes a subsidiary, a special purpose vehicle (“SPV”) that launches a takeover bid on the shares of company B (step 1).[[52]](#footnote-52) Again, most of the shareholders sell their shares to the SPV (which now holds 60% of the shares), but some of the shareholders of company B decide to hold on to their shares (step 2). Therefore, company B is merged into the SPV, while the minority shareholders receive cash in consideration for their shares (cash merger – step 3).

A

SPV(B)\*

Step 3

100%

Cash

*Figure 2. Cash merger as a freeze-out technique.*

SPV

B

B-shareholders

TOBN

Step 1

A

100%

Step 2

SPV

B

B-shareholders

40%

60%

A

100%

B-shareholders

\*The “(B)” indicates that the SPV has absorbed company B through a merger.

A comparison between figure 2 and figure 1 illustrates very well that the United States reach a very similar result with the cash merger compared to the European squeeze-out, even though the transactional technique looks quite different: a merger in contrast to the *sui generis* procedure of the squeeze-out. However, the similar result should not obscure the fact that the threshold and the protection of minority shareholders are very different in the United States and in Europe (see further in chapter 7).

### Stock merger

1. **Technique.** Since cash mergers are not available in most European countries, freeze-outs were not considered feasible below the threshold for the statutory squeeze-out. However, in the Netherlands the regular stock merger *(i.e.* a merger where new shares are issued in return for the old shares) has been used recently as a freeze-out technique, and the courts have approved this (see further in chapter 5). This evolution has been facilitated by the fact that under Dutch law it is possible to issue shares in a member of the group of the merged entity instead of in the merged entity itself (the so-called triangular merger or *“driehoeksfusie”[[53]](#footnote-53)*).
2. **Triangular stock merger – example.** For example, company A establishes a subsidiary (“SPV”), which launches a takeover bid on the shares of company B (step 1).[[54]](#footnote-54) Again, most of the shareholders sell their shares to the SPV (which now holds 80% of the shares), but some of the shareholders of company B decide to hold on to their shares (step 2). Therefore, company B is merged into the SPV, while the minority shareholders of B receive shares in company A, a group member of the SPV (triangular merger – step 3).

SPV

B

B-shareholders

TOBN

Step 1

A

100%

Step 2

SPV

B

B-shareholders

20%

80%

A

100%

(the figure continues on the next page)

Step 3

100%

A

SPV(B)

A-shareholders

*Figure 3. Triangular merger as a freeze-out technique.*

B-shareholders

1. **Stock merger – example.** If a triangular merger is not possible, as is the case in Belgium, the transaction structure is somewhat less flexible. For example, company A launches a takeover bid on the shares of company B (step 1). Most of the shareholders sell their shares to company A (which now holds 80% of the shares), but some of the shareholders of company B decide to hold on to their shares (step 2). Therefore, company B is merged into company A, while the minority shareholders of B receive shares in company A (stock merger – step 3).

A

B

B-shareholders

TOBN

Step 1

A

B

B-shareholders

Step 2

20%

80%

Step 3

A(B)

A-shareholders

*Figure 4. Stock merger as a freeze-out technique.*

B-shareholders

1. **Minority shareholders not cashed out.** As is illustrated by figure 3 and figure 4, the minority shareholders of company B that do not accept the takeover bid are not cashed out, as happens with an American cash merger, but become shareholders in the topholding, company A. While they may still be a nuisance there, this is presumably less of a problem than if they were to remain minority shareholders in company B. Indeed, the (triangular) stock merger simplifies the structure and puts an end to the costs of a separate listing for company B and of having minority shareholders in company B.[[55]](#footnote-55) This is certainly the case if company A is a large listed company, where the addition of the (former) minority shareholders of company B will not pose a problem.[[56]](#footnote-56)
2. **Diluting minority shareholders through a stock merger.** In addition, the transaction can be structured in such a way that the stock merger dilutes the minority shareholders below the 5% or 10% threshold, so that they can be squeezed out.[[57]](#footnote-57) This is especially useful if the controlling shareholder does not want minority shareholders in the topholding company.

Let us come back to the example of the last figure to illustrate this point. Company A has acquired 80% of the shares (80.000 shares) in company B, while the other 20% (20.000) shares are owned by various minority shareholders. Company A has issued 100.000 shares to its shareholders with an intrinsic value of 10.000 each, while Company B has issued 100.000 shares with an intrinsic value of 1.000 each. Company B merges into company A, and the minority shareholders of B receive 1 share in company A for each 10 shares they had in company B[[58]](#footnote-58), or 2.000 shares in total. The result is that the original A shareholders hold roughly 98,04% of the shares in the merged entity (100.000 / 102.000[[59]](#footnote-59)), while the former B shareholders hold only 1,96% of the shares (2.000 / 102.000). This means that this transaction has diluted the minority shareholders of B to such an extent that they can be squeeze-out, if this is considered desirable by company A (cfr. figure 5 below).

100%

(100k)

A(B)

A-shareholders

B-shareholders

1,96% (2k)

98,04%

(100k)

A

B

B-shareholders

20% (20k)

80% (80k)

A-shareholders

*Figure 5. Dilution through a stock merger.*

### De facto merger (sale of all assets and liquidation)

1. **Technique.** Another technique to freeze out minority shareholders is the so-called de facto merger: a sale of all assets of the target company to the bidder, followed by a liquidation of the target. This also effectively cashes out the minority shareholder of the target company. It should be noted, however, that such a transaction in principle does not enjoy the advantage of legal continuity. However, according to article 770 of the Belgian Companies Code, parties can voluntarily opt to subject such a transaction to a regime of legal continuity if they follow the procedure of the Belgian Companies Code. This means that this transaction structure becomes very similar to an American cash merger *qua* effect. Nevertheless, the fact that the transaction is not remunerated by shares might have disadvantageous tax consequences, as fiscal neutrality will not be possible under Belgian corporate taxation.[[60]](#footnote-60) These tax aspects, however, fall outside the scope of this master thesis.
2. **Example.** The following example can clarify the de facto merger freeze-out technique. For example, company A establishes a subsidiary (“SPV”), which launches a takeover bid on the shares of company B (step 1).[[61]](#footnote-61) Again, most of the shareholders sell their shares to the SPV (which now holds 60% of the shares), but some of the shareholders of company B decide to hold on to their shares (step 2). Therefore, company B sells all of its assets to company A, in return for cash (black arrows in step 3). Then, company B is liquidated and distributes its cash to its shareholders: company A and the minority B-shareholders (grey arrows in step 3). The result (step 4) is that the SPV now owns the assets of company B and that the minority shareholders are cashed out, which is very similar to the result reached with a cash merger (cfr. figure 2).

*Figure 6. De facto merger as a freeze-out technique.*

A

SPV(assets of B)

B-shareholders

Step 4

100%

Cash

SPV

B

B-shareholders

TOBN

Step 1

A

100%

Step 2

SPV

B

B-shareholders

40%

60%

A

100%

Step 3

40%

A

100%

Cash

SPV

B

B-shareholders

60%

Cash

Sale assets

Cash

Liquidation

### Delisting

1. **The Netherlands.** Finally, a delisting can also function as a freeze-out technique by diminishing the nuisance value of minority shareholders by eliminating the costs of a listing, although it does not eliminate the minority shareholders from the company. In the Netherlands, however, the threshold for requesting a delisting with Euronext Amsterdam is also 95% of the shares, like a squeeze-out.[[62]](#footnote-62) Therefore, a delisting offers no additional advantages as a freeze-out technique.
2. **Belgium**. In Belgium, Euronext Brussels can allow a delisting if there is no longer a “normal and regular market” in the securities.[[63]](#footnote-63) The Financial Services and Markets Authority (FSMA), can block a delisting to protect the interests of the minority shareholders. It is very unlikely that the FSMA will allow such a delisting below the threshold of 95%.[[64]](#footnote-64) Therefore, a delisting does not amount to an effective freeze-out technique, which is why it will not be further discussed in this master thesis.

### Conclusion

1. **Conclusion.** In conclusion, The United States have a very flexible instrument to freeze-out minority shareholders at a low threshold, namely the cash merger. In Europe, the squeeze-out is only possible at a high threshold of 90% or 95%. However, there are alternative freeze-out techniques available too, such as the merger or the de facto merger. These techniques can accomplish a similar result as the American cash merger, even though the transaction structure is more complex. Nevertheless, there is a legal risk to using these alternative techniques, as they were not designed to be used as a freeze-out technique. This raises the question whether such a technique is legally valid, or whether it is an abuse of majority. This question is answered further in the separate chapters on each country. In the following chapters, we will focus on the cash merger, the squeeze-out and the stock merger as freeze-out techniques, as these are most common.

# Freeze-outs in the United States

## Introduction

1. **Introduction.** This chapter will discuss how freeze-outs are treated under the law of the United States. However, because corporate law is mainly a competence of the states[[65]](#footnote-65), this chapter will only discuss the law of Delaware. The reason why Delaware is chosen is because it is the most developed and the most popular jurisdiction for incorporations in the United States, as more than half of all listed corporations in the United States are incorporated there.[[66]](#footnote-66) For freeze-outs, especially the law on mergers and the law on the fiduciary duties of directors is relevant and will be studied. Securities law, which is a federal competence in the United States, will not be studied as it falls outside the scope of this master thesis (see above in paragraph 12).
2. **Overview of the chapter.** As discussed in part 2.1, freeze-outs can be classified into post-acquisition freeze-outs, which will be discussed in part 3.6, and going private freeze-outs, which will be discussed in part 3.5. The going private freeze-outs can again be subdivided into two forms: the one-step freeze-out (discussed in part 3.5.2) and the two-step freeze-out (discussed in part 3.5.3).[[67]](#footnote-67) Minority shareholders have two main remedies against freeze-outs: the appraisal remedy (discussed in part 3.3) or a class action for breach of fiduciary duties (discussed in parts 3.4 to 3.6). Before we discuss these remedies, however, we will give a brief history of American law on freeze-outs (part 3.2). This will help us understand the American law better, but will also prove illustrative to study the European regime, as European countries are currently in one of the earlier phases of the evolution in the United States.

## A brief history of freeze-outs in the United States

1. **First phase: vested rights.** Weiss distinguishes four phases in the development of freeze-outs in the United States before the *Singer[[68]](#footnote-68)* decision of the Delaware Supreme Court.[[69]](#footnote-69) In the first phase, at the end of the 19th century, amendments to the corporation’s charter and fundamental transactions required unanimous shareholder approval.[[70]](#footnote-70) The underlying idea was that the charter was a contract that gave vested rights to each shareholder.
2. **Second phase: the beginning of liberalization.** In the second phase, in the 1910’s and 1920’s, the state legislatures came to the conclusion that unanimity lead to a “tyranny of the minority” and prevented value-increasing transactions.[[71]](#footnote-71) Therefore, many states allowed corporations to enter into fundamental transactions, such as mergers or sales of all assets, if approved by a (super)majority of shareholders. However, courts were unwilling to allow these powers granted by the legislator to be used to freeze out minority shareholders. These powers could only be used for other business reasons and freeze-outs were considered to be an abuse. It is also in this phase that appraisal rights were introduced, to give minority shareholders and exit opportunity if they do not agree with the transaction.[[72]](#footnote-72)
3. **Third phase: the first cash merger statutes.** In the third phase, during the 1920’s and 1930’s, the liberalization trend continued and many states introduced cash mergers.[[73]](#footnote-73) However, it was not necessarily the intention of the legislators that these would be used to freeze out minority shareholders. Rather, the goal of the statutes was to provide managers with more flexibility in structuring their transactions. Indeed, Weiss argues that courts, authors and the legislator still considered freeze-outs as a form of “fraud on the minority shareholders”, and thus impermissible.[[74]](#footnote-74)
4. **Fourth phase: freeze-out mergers legitimated.** In the fourth phase, during the 1930’s and 1940’s, merger statutes were interpreted by the courts to allow cash mergers to be used to freeze-out minority shareholders.[[75]](#footnote-75) In addition, the courts ruled that the appraisal remedy was the exclusive remedy against these freeze-out mergers.[[76]](#footnote-76) However, as will be discussed in the next chapter, the appraisal remedy was (and still is) unfit to protect minority shareholders against freeze-outs.
5. **Judicial intervention: *Singer* and *Weinberger*.** Therefore, the Delaware courts stepped in to provide minority shareholders with more protection in freeze-outs, based on the fiduciary duties of directors and controlling shareholders. In *Singer[[77]](#footnote-77)*, the Delaware Supreme Court ruled that freeze-outs constitute a breach of the directors’ and controlling shareholders’ fiduciary duties[[78]](#footnote-78) if the transaction does not fulfil a “business purpose”. The court no longer considered the appraisal remedy[[79]](#footnote-79) as the exclusive remedy. The strict business purpose test would later be toned down to the “entire fairness test” in *Weinberger[[80]](#footnote-80)* (see further in paragraph 80 and following), but *Singer* definitely announced a change in the judicial scrutiny of freeze-outs.

This way, the stage was set for a long line of case law of the Delaware courts that balances the wish of controlling shareholders to freeze out minority shareholders with the protection of the financial interests of these minority shareholders. This line of case law will be further discussed in part 3.5. But first, we will study the appraisal remedy in depth, as it is necessary to understand how the failures of the appraisal remedy necessitated a remedy based on breach of fiduciary duties.

## Appraisal remedy

1. **Introduction.** Before we study the fiduciary duty remedies against each type of freeze-out, we will discuss a remedy that can be used in case of a merger[[81]](#footnote-81), including a freeze-out merger: the appraisal remedy. Appraisal rights grant dissenting shareholders the right to request the corporation to pay them the fair value of their shares in cash, as determined by a court and regardless of any illegality.[[82]](#footnote-82) An appraisal procedure only grants the right to a fair price and cannot stop the merger from taking place. Appraisal rights are governed by section 262 of the Delaware General Corporation Law. They are not available in the case of a short-form merger[[83]](#footnote-83) (section 262(b) iuncto §253 Delaware General Corporation Law).
2. **Purpose of appraisal rights.** As discussed paragraph 55, appraisal rights were introduced because of the shift from consensus to majority vote in corporate law.[[84]](#footnote-84) Originally, appraisal rights had a “liquidity purpose”: they ensured that a minority shareholder was not trapped inside a corporation that had fundamentally changed as compared to when the shares were purchased.[[85]](#footnote-85) But the appraisal remedy is nowadays much more often used as protection against freeze-outs, which concerns the opposite situation: minority shareholders being forced against their will out of the corporation. However, due to its different original purpose, the appraisal remedy is a remedy that is ill suited to protect minority shareholders against freeze-outs. Indeed, the appraisal remedy suffers from many disadvantages as a remedy, especially when compared to the more popular remedy of breach of fiduciary duties.[[86]](#footnote-86)
3. **Disadvantage 1: procedural requirements.** First, the procedural requirements for perfecting appraisal rights are quite strict. The claimant must be a shareholder and must continue to hold his shares until the effective date of the merger. In addition, the shareholder must not vote in favour of the merger (section 262(a) DGCL) and must notify the corporation of its dissent in advance (section 262(d) DGCL). This compliance burdens complicate the use of appraisal rights, especially for smaller shareholders.
4. **Disadvantage 2: valuation difficulties.** Second, the calculation of the fair value of the shares in an appraisal procedure has been considered to be disadvantageous for the minority shareholders.[[87]](#footnote-87) In the past, courts have deferred to the market value to determine the fair value of shares. However, Wertheimer has criticized this deference to market price, as the market price fluctuates and the controlling shareholder can time the freeze-out when the market price is low, or even try to manipulate the market price, to the detriment of the minority shareholders.[[88]](#footnote-88) In addition, the market price reflects a minority discount, which should not be taken into account in determining the fair value of shares.[[89]](#footnote-89)

In addition, for a long time, the old “Delaware block method” was used to value shares, which relied on a weighted average of the “net asset value”, the “earnings value” and the “market value”.[[90]](#footnote-90) However, this method was at odds with modern financial valuation theory. In *Weinberger*, the Delaware Supreme Court abandoned the monopoly of the Delaware block method. The court allowed any valuation method that was generally accepted, including the discounted cash flow method, which is now the most prominent method.[[91]](#footnote-91) Nevertheless, a rescissory measure of damages, which takes into account an increase in value that occurs after the freeze-out but before awarding the damages, is not possible under the appraisal remedy, unlike as in case of a breach of fiduciary duties.[[92]](#footnote-92)

1. **Disadvantage 3: litigation-related problems.** Finally, appraisal procedures are expensive and lengthy. This means that shareholders only receive the fair value of their shares after years of costly litigation.[[93]](#footnote-93) In addition, class actions are not possible, unlike as for a suit for breach of fiduciary duties.[[94]](#footnote-94)
2. **Conclusion.** For these reasons, appraisal rights are an insufficient remedy to protect minority shareholders against freeze-outs. This raised the question: is the appraisal remedy the exclusive remedy against freeze-out mergers, or can shareholders also file a suit based on a breach of fiduciary duties? Under Delaware case law, it is now clear that in some circumstances both remedies can be combined.[[95]](#footnote-95) In part 3.5, this issue is further discussed. But first, we discuss some general concepts that are necessary to understand fiduciary duties.

## Fiduciary duties in general

1. **Basic concepts of director’s fiduciary duties.** As directors of a corporation may not act for their own benefit, but must act in the interest of the corporation, they are said to have a fiduciary duty to the corporation.[[96]](#footnote-96) This fiduciary duty consists of two specific duties: (1) a duty of care, i.e. a duty to exercise care and be informed when making decisions, and (2) a duty of loyalty, i.e. a duty to act in the interests of the corporation instead of one’s own interests.[[97]](#footnote-97)
2. **Duty of care and the “business judgment rule”.** Establishing a breach of the duty of care of directors is in a way similar to establishing the general tort of negligence. However, there is also an important difference, as business decisions of directors are inherently special: it is not easy to distinguish right decisions from wrong decisions (except with hindsight), and directors have to exercise their discretion in such cases.[[98]](#footnote-98) For this reason, courts exercise restraint when reviewing business decisions of directors and refrain from substituting their own judgment for that of the directors. This is what is called the “substantive aspect” of the “business judgment rule”.[[99]](#footnote-99)

In addition, the business judgment rule also has a “procedural aspect”.[[100]](#footnote-100) In the case of *Aronson v. Lewis*[[101]](#footnote-101), the Delaware Supreme Court held that *“[the business judgment rule] is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.”* Balotti & Hanks criticize the use of the word “presumption”, however, as the burden of proof was already on the plaintiff.[[102]](#footnote-102) What the court actually means is that the plaintiff must overcome a higher burden of proof than in other liability cases to establish a director’s liability.

1. **Duty of loyalty and the “entire fairness test”.** However, there are cases where the business judgment rule does not apply, for example when there is a conflict of interest (also called “self-dealing”).[[103]](#footnote-103) Indeed, as mentioned above, the duty of loyalty implies that a director should put the corporation’s interest above his or her own financial interest. It is in the landmark case of *Sinclair Oil v. Levien[[104]](#footnote-104)* that the Delaware Supreme Court ruled that in cases of self-dealing, the “entire fairness test” applies instead of the business judgment rule.[[105]](#footnote-105) In such cases, the burden of proof is on the defending directors to demonstrate the “entire fairness” of the transaction, which consists of a “fair dealing” and a “fair price”[[106]](#footnote-106).
2. **Relevance of different standard of review.** Whether a decision will be reviewed under the business judgment rule or under the entire fairness tests, is very important in practice. In essence, it concerns the question of how much freedom courts give to directors when reviewing their decisions.[[107]](#footnote-107) It is especially important in determining the chance of success of a motion to dismiss: while the motion to dismiss will normally be granted under the business judgment rule (except when the plaintiff can provide elements that point to an abuse), a motion to dismiss will almost always be denied under the entire fairness test.[[108]](#footnote-108) This means that entire fairness cases are much more likely to effectively proceed to trial, which enlarges their settlement value.
3. **Derivative (class action) suits.** It should be noted that violations of the directors’ fiduciary duties lead to a claim for the corporation against its directors. However, since these same directors have the competence to file such a claim, the more likely option for minority shareholders is to file a derivative suit.[[109]](#footnote-109) This means that an individual shareholder sues the directors on behalf of the corporation. Such a derivative suit for violation of fiduciary duties can be filed as a class action, unlike the appraisal remedy (see above in paragraph 63).[[110]](#footnote-110)
4. **Remedies: damages or void transaction?** Unlike for the appraisal remedy, shareholders can file a suit for breach of fiduciary duties as a class action.[[111]](#footnote-111)In such a suit, the traditional remedy is the annulment of the transaction.[[112]](#footnote-112) However, it will often not be practically possible to unwind a merger after a lengthy trial, as this would cause too much harm to third parties. Therefore, courts typically award damages instead.[[113]](#footnote-113) The court can even award “rescissory damages”: parties receive damages to restore them in their positions before the breach of fiduciary duties.[[114]](#footnote-114) This is more generous for the claimant than the appraisal remedy, because the shares are valued at the time when the damages are awarded, and not at the time of the merger. Hence, minority shareholders can benefit from increases in value after the merger.
5. **Conclusion.** The more generous measurement of damages in case of a breach of fiduciary duty, combined with the possibility of class actions and other procedural advantages, makes a suit for breach of fiduciary duties a more attractive remedy to challenge freeze-outs than the appraisal remedy (cfr. above in paragraph 64).
6. **Fiduciary duties of shareholders.** It is important for freeze-outs by controlling shareholders that the law has not only imposed fiduciary duties on directors, but also on controlling shareholders.[[115]](#footnote-115) The Delaware Supreme Court has ruled in *Singer[[116]](#footnote-116)* that this is settled case law. *Kahn* hasformulated this as follows: *“a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation”*[[117]](#footnote-117). The rationale behind extending fiduciary duties to controlling shareholders is that the board of directors is not really independent from the controlling shareholders.[[118]](#footnote-118) Therefore, the general principles on fiduciary duties described above also apply to the fiduciary duties of controlling shareholders. This is especially important for freeze-outs, as these cases are usually primarily targeted against the controlling shareholder that is freezing out the minority shareholders, rather than the directors.

## Going private freeze-outs

### Introduction

1. **Introduction.** We will now discuss the remedies based on fiduciary duties for the different types of freeze-outs, focusing especially on the case law concerning the fiduciary of controlling shareholders in freeze-out situations, as this will have a huge impact on the structuring of transactions.
2. **One-step freeze-out (general).** In the United States, both one-step and two-step going private freeze-outs rely on the use of cash mergers as a freeze-out technique. In the one-step freeze-out (discussed in part 3.5.2), the majority shareholder merges itself or a subsidiary in the target company through a long-form merger (section 251 Delaware General Corporation Law). In a long-form merger, two corporations merge according to the terms of a merger agreement, after approval by both boards of directors and by the shareholders with a majority of the outstanding shares.[[119]](#footnote-119) The minority shareholders can receive stock or cash as consideration, but cash as consideration is the most commonly used to completely eliminate minority shareholders.[[120]](#footnote-120)
3. **Two-step freeze-out (general).** In the two-step freeze-out (discussed in part 3.5.3), a voluntary tender offer is first made for all shares, followed by a short-form cash-out merger (section 253 Delaware General Corporation Law) if the majority shareholder owns more than 90% of the shares. The short-form merger is faster and can be adopted by a unilateral resolution of the controlling shareholder, without approval of the minority shareholders.[[121]](#footnote-121)

### Breach of fiduciary duty: one-step freeze-outs

1. **Introduction.** Above in paragraph 64, we already signalled the question whether the appraisal remedy is the exclusive remedy against freeze-out mergers, or whether minority shareholders can also claim on the basis of a breach of fiduciary duties. It is important to note that a freeze-out can be considered as a self-dealing transaction, because the controlling shareholder stands at both sides of the transaction. For this reason, the Delaware courts stepped in to demand additional procedural safeguards to ensure the protection of minority shareholders based on the fiduciary duties of directors and controlling shareholders.
2. ***Singer.*** In *Singer v. Magnavox Co*.[[122]](#footnote-122), the Delaware Supreme Court ruled that a freeze-out merger violates a fiduciary duty of the controlling shareholder towards the minority shareholders if the merger does not serve a legitimate business purpose, other than eliminating minority shareholders.[[123]](#footnote-123) The court overruled its previous case law that held that the appraisal remedy is the only remedy against a freeze-out merger, and considered that the controlling shareholder owes a fiduciary duty to the minority shareholders.[[124]](#footnote-124) Consequently, it is up to the controlling shareholder to establish the entire fairness of the merger. For this, it is insufficient to show that the price is fair or by referring to the possibility of appraisal remedy.[[125]](#footnote-125) Finally, in clear language the court held that a majority shareholder cannot *“cause a merger to be made for the sole purpose of eliminating a minority on a cash-out basis”*[[126]](#footnote-126) and that a *“merger, made for the sole purpose of freezing out minority shareholders, is an abuse of the corporate process”*.[[127]](#footnote-127) In conclusion, the *Singer* case established a “business purpose test” as a condition for the validity of freeze-outs.[[128]](#footnote-128)
3. ***Tanzer.*** In *Tanzer v. International General Industries, Inc.* [[129]](#footnote-129), the Delaware Supreme Court had to decide whether a merger where the parent cashed out the minority shareholders of its subsidiary was a violation of the fiduciary duties of the parent as shareholder. The court had to interpret the *Singer* test whether the merger serves a genuine business purpose other than eliminating minority shareholders. Strangely enough, the court ruled that this business purpose could also include the controlling shareholder’s own business purpose.[[130]](#footnote-130) This decision seems inconsistent with the approach taken in *Singer*.[[131]](#footnote-131) If we interpret the case lawas meaning that the controlling shareholder cannot eliminate minority shareholders for purely idiosyncratic reasons, the business purpose test seems to be “interpreted out of existence” by *Tanzer*, as the majority shareholder will always be able to claim some financial interest in removing the minority shareholder.[[132]](#footnote-132)
4. **Critique on business purpose test.** The business purpose test developed by *Singer* and *Tanzer* has been subject to critique in the literature. First, Weiss has argued that it is unclear what the business purpose actually requires, and whether it has any practical meaning at all.[[133]](#footnote-133) It is striking that the court failed to explain in a coherent manner which purpose should be taken into account and how the purpose should be determined. This uncertainty leads to conflicting and highly subjective court decisions. Second, Bainbridge has noted that the business purpose test is a purely formalistic test that does not adequately protect minority shareholders.[[134]](#footnote-134) Transaction planners could easily circumvent the business purpose test by inventing reasons to freeze out minority shareholders and creating a paper trail to support these reasons. Hence, it is not surprising that the business purpose test of *Singer* and *Tanzer* was abolished by the Delaware Supreme Court in *Weinberger*.
5. ***Weinberger* - facts*.*** In *Weinberger v. UOP, Inc.*[[135]](#footnote-135), the Delaware Supreme Court had to rule on the validity of a cash merger between Signal and its 50,5% subsidiary, UOP. The plaintiffs, minority shareholders of UOP had filed a class action against Signal, UOP, the directors of both companies, and UOP’s investment bank Lehman Brothers, claiming that the merger was unfair. The facts of the case were as follows: Signal sought to acquire the remaining shares of UOP. Therefore, certain directors of Signal, who were also director of UOP, prepared a feasibility study on the acquisition of the shares. The report was prepared using information from UOP and concluded that a price of up to $24 per share was a good investment for Signal. However, this report was not disclosed to the other UOP directors or the UOP shareholders. Lehman Brothers, UOP’s investment bank also prepared a fairness opinion, but this was “hurriedly done” according to the court. The board of Signal proposed a price of $21 per share, which was also considered fair in the opinion of Lehman Brothers. The UOP board accepted this proposal without much negotiation. While the Signal directors in the UOP board formally abstained from voting, they participated during various stages of the process.
6. ***Weinberger* – legal issues*.*** The court considers the question whether the duty of loyalty was violated by the controlling shareholder Signal. The court holds that it is a situation of self-dealing and that it should be analysed under the “entire fairness test”, which has two basic aspects: “fair dealing” (a procedural element) and “fair price” (a substantive element).[[136]](#footnote-136) It should be noted that this is fundamentally different from the appraisal remedy, which is solely concerned with determining a fair price and not a fair dealing.[[137]](#footnote-137) According to the court, fair dealing is about *“when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained”*[[138]](#footnote-138). Fair price, on the other hand, relates to *“the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other element that affects the intrinsic or inherent value of a company’s stock”*[[139]](#footnote-139). Nevertheless, both aspects should not be examined separately, but rather as a whole.[[140]](#footnote-140) Finally, the court explicitly reverses the *Singer* case law and holds that the business purpose test no longer applies.[[141]](#footnote-141)
7. ***Weinberger* – conclusion of the court*.*** Given the facts and the state of the law as understood by the court, the court came to the conclusion that the merger failed the test of fairness, concerning both fair dealing as well as fair price. Concerning the fair price aspect of the entire fairness test, the Delaware Supreme Court ruled that the Delaware Chancery Court was wrong to decide that the “Delaware Block Method” was the exclusive method for establishing a fair price (cfr. above in paragraph 62). Instead, the Delaware Supreme Court ruled that the fair price should be established through *“any techniques or methods which are generally considered acceptable in the financial community”*[[142]](#footnote-142).

In addition, the court held that the failure to disclose the feasibility study, the hurried preparation of the fairness opinion, and the lack of real arm’s length negotiations all violate the fair dealing requirement.[[143]](#footnote-143) Because the vote by the shareholders was uninformed, the majority of the minority approval could not cleanse these defects.

1. ***Weinberger* – the importance of a footnote*.*** However, in a very important footnote, the court signals to legal practice how they could validly structure a freeze-out merger:

*“The result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm’s length. (…) Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm’s length is strong evidence that the transaction meets the test of fairness.”[[144]](#footnote-144)*

Legal practice soon picked up this signal in Weinberger and began using special committees of independent directors (“SC’s”) that negotiate the freeze-out merger.[[145]](#footnote-145) Nevertheless, it remained unclear under *Weinberger* what the precise consequences were of procedural safeguards such as a special committees of independent directors. Would this shift the standard of review to the business judgment rule, or would this only shift the burden of proof of entire fairness to the plaintiff? This question was answered in the *Getty Oil* and *Kahn* cases.

1. ***Getty Oil.*** First, the Delaware Supreme Court held in *Rosenblatt v. Getty Oil[[146]](#footnote-146)* that the initial burden of proof of challenging the entire fairness of a transaction is borne by the controlling shareholder standing on both sides of the transaction, in casu Getty Oil (the majority owner of Skelly Oil). However, the court rules that the burden of proof of establishing entire fairness shifts to the plaintiff if the freeze-out merger is approved by an informed vote of a “majority of the minority”.[[147]](#footnote-147) Still the court analysed the case under the entire fairness test, as an approval by the majority of the disinterested minority shareholders was considered insufficient to shift the standard of review to the business judgment rule.[[148]](#footnote-148) The standard of review remains entire fairness.
2. ***Kahn*.** Nine years after *Getty Oil,* the Delaware Supreme Court ruled in *Kahn v. Lynch[[149]](#footnote-149)* on the effect of another procedural safeguard for minority shareholders, the special committee of independent directors. In casu, Alcatel, the controlling shareholder in Lynch, effected a freeze-out merger with Lynch after approval by a special committee of independent directors of Lynch. The court reaffirms that the standard of review for freeze-outs mergers is entire fairness, and not the business judgment rule, even with this special committee.[[150]](#footnote-150) The policy rationale for this is the fundamentally suspicious nature of such self-dealing transactions. Indeed, the controlling shareholder can be compared to an “800-pound gorilla” that can threaten with retaliation against the minority shareholders.[[151]](#footnote-151)

The court also notes, however, that it previously held in a footnote in *Weinberger* that a special committee of independent directors is strong evidence of entire fairness.[[152]](#footnote-152) In addition, the court already decided that approval by a majority of minority shareholders shifts the burden of proof to the plaintiff. Therefore, the Delaware Supreme Court in Kahn holds that the approval of the freeze-out merger by a special committee of independent directors that has the power to veto the transaction also shifts the burden of proof of establishing entire fairness to the plaintiff.[[153]](#footnote-153) However, the court also rules that the special committee must have “real bargaining power” and must be “truly independent” for the burden to shift.[[154]](#footnote-154)

In casu, the court decides that the burden of proof did not shift, because the process did not simulate at arm’s length bargaining. Indeed, Alcatel threatened to make a hostile tender offer at a lower price if its offer were not accepted.[[155]](#footnote-155) Gilson & Gordon provide some more guidance on what should be understood under the “right to say no” or the veto power of the special committee: the special committee must be able to reject the proposed freeze-out merger. If the controlling shareholder still wants to continue, he can make a direct tender offer to the shareholders. In such a case, however, Gilson & Gordon argue that the special committee has the power (but not the duty) to temporarily block the tender offer with a poison pill to buy some time to review the offer and investigate alternatives.[[156]](#footnote-156)

1. **Conclusion.** In conclusion, from the case law that originated with *Weinberger* follows that the controlling shareholder must establish the entire fairness of a one-step freeze-out merger, including fair dealing and fair price. However, from subsequent cases follows that the controlling shareholder can shift the burden of proof of establishing entire fairness to the minority shareholders if he complies with certain procedural safeguards: either approval by a majority of the minority shareholders (*Getty Oil*) orapproval by a special committee of independent directors (*Kahn*).

Nevertheless, the question remains: what is the effect of adopting both procedural safeguards? Does this shift the standard of review to the more deferential business judgment rule, or is there simply no additional benefit? From the case law at this point, it seems that the second answer is correct, meaning that there is no incentive for controlling shareholders to adopt both procedural safeguards.[[157]](#footnote-157) This question is discussed further in part 3.5.4 and 3.5.5. But first, we discuss two-step freeze-outs.

### Breach of fiduciary duty: two-step freeze-outs

1. **Introduction.** As discussed above, the case law of the Delaware courts applies the stringent “entire fairness test” to one-step freeze-outs. However, practice soon discovered a transactional route that is reviewed under the much less strict business judgment rule by the Delaware courts: the two-step freeze-out, i.e. a tender offer followed by a short-form freeze-out merger.[[158]](#footnote-158)
2. ***Solomon.*** The case that built the foundations for this less stringent regime for two-step freeze-outs was *Solomon v. Pathe Communications Corp.[[159]](#footnote-159)* In this case, the Delaware Supreme Court ruled that a voluntary tender offer by a majority shareholder is not subject to the stringent entire fairness test.[[160]](#footnote-160) Prior to this ruling, practitioners generally assumed that the entire fairness test was applicable, because of the conflict of interest between majority and minority shareholders.[[161]](#footnote-161) The rationale behind the ruling was that, supposedly, shareholders can freely decide whether to accept the offer or not and that majority shareholders and minority shareholders are unrelated parties.[[162]](#footnote-162) Concerning the applicability of this rationale, it should be kept in mind that the *Solomon* case itself stipulated that a tender offer can only be considered voluntary (and hence reviewed less strictly) if the tender offer is not coercive and is not accompanied by false or misleading disclosures.[[163]](#footnote-163) However, as we will discuss further in part 8.3, it can be argued that tender offers (especially by a controlling shareholder) are structurally coercive due to the “pressure to tender problem”.[[164]](#footnote-164) This would defeat the rationale of subjecting tender offers to a less stringent standard of review.

Finally, *Solomon* was actually not about a tender offer in the context of a two-step freeze-out, but concerned a very unusual situation of a creditor (Credit Lyonnais) launching a tender offer in connection with the foreclosure on its security interest on shares of the company.[[165]](#footnote-165) Therefore, it remained unclear what the exact the precedent value of *Solomon* wasfor freeze-outs, until *Siliconix* clarified this point.

1. ***Siliconix.*** In *In re Siliconix Inc. Shareholders Litigation*[[166]](#footnote-166), the Delaware Chancery Court had to rule on a preliminary motion to enjoin a tender offer by Vishay, the controlling shareholder of Siliconix, on the shares of Siliconix. The tender offer was the first step of a two-step freeze-out and Vishay had announced that it had the intention to proceed with a short-form merger afterwards. The offer was not recommended by the special committee of Siliconix, but did include a non-waivable provision of “majority of the minority” approval.

In a very important decision, the Delaware Chancery Court ruled that a voluntary tender offer (even if part of a two-step freeze-out) is not subject to review under the entire fairness standard and that the controlling shareholder has no duty to offer a fair price to the minority shareholders.[[167]](#footnote-167) Consistent with what was ruled in *Solomon*, “voluntary” implies the absence of coercion or disclosure violations. The court reasons that this less stringent test is justified because *“shareholders of Delaware corporations are free to accept or reject the tender based on their own evaluation of their best interests”*[[168]](#footnote-168).

Still, the court agrees that the difference in judicial scrutiny of one-step freeze-outs as compared to two-step freeze-outs is strange. However, the court justifies this difference in treatment that a tender offer is not a “corporate” action, that there is no statutory role for the board in case of tender offers, unlike for mergers.[[169]](#footnote-169) In addition, the court argues that accepting or rejecting the tender offer is an individual decision of the shareholders (and that hence minority shareholders are sufficiently protected), while for mergers the opposite is true.[[170]](#footnote-170)

In this case, the court decided that the plaintiff did not prove any form of coercion or disclosure violation. Hence, the motion for preliminary injunction was denied. *Siliconix* offers a clear signal to practitioners to structure their transactions as two-step freeze-outs, as the tender offer will not be reviewed under the entire fairness test. Indeed, Subramanian and restrepo take this decision as the starting point for studying the use of two-step freeze-outs.[[171]](#footnote-171) However, one element of the two-step freeze-out puzzle was still missing. Indeed, *Siliconix* only concerned the first step of the two-step freeze-out, the tender offer. The question remained how the second step of the two-step freeze-out, the short-form merger, would be treated. This question was answered in *Glassman*.

1. ***Glassman.*** The Delaware Supreme Court held in *Glassman v. Unocal Exploration Corp.*[[172]](#footnote-172) that the second step of the two-step freeze-out, the “back-end” short-form merger, is not subject to an entire fairness review either.[[173]](#footnote-173) The controlling shareholder of Unocal Exploration Corporation wanted to eliminate the minority shareholder through a section 253 Delaware’s short-form freeze-out merger (section 253 DGCL). The court ruled that the goal of the statute was to provide a *“simple, fast and inexpensive process for accomplishing a merger”*[[174]](#footnote-174), without shareholder approval. Hence, the only remedy against a short-form freeze-out merger is the appraisal remedy, excluding a breach of fiduciary duty suit.[[175]](#footnote-175) This is very important, because as we have seen above in paragraph 71, class action entire fairness suits have many advantages in comparison with the appraisal remedy.
2. **Interim conclusion.** The combination of *Siliconic* and *Glassman* gives a clear signal to transactional planners on how to structure their transactions: they can avoid the stringent entire fairness test in favour of the business judgment rule by structuring a going private transaction as a two-step freeze-out instead of a one-step freeze-out.[[176]](#footnote-176) Particularly, this means that the recommendation of a special committee of independent directors is not required.

This disparate treatment of one-step and two-step freeze-outs was criticized in legal doctrine. We discuss this debate in the next part on the convergence towards a unified regime for both transactional forms. But we first turn to the *In re Pure Resources[[177]](#footnote-177)* decision of the Delaware Chancery Court, where the court already made a first (but insufficient) step towards convergence of both regimes.[[178]](#footnote-178)

1. ***Pure Resources* – ruling.** In *In re Pure Resources[[179]](#footnote-179),* the Delaware Chancery Court concretized the “no coercion” condition put forward by *Solomon* and *Siliconix*, in order to enhance the protection of minority shareholders. In this case, Unocal, the controlling shareholder, launched a tender offer as part of a two-step freeze-out to acquire the remaining shares in Pure Resources. A special committee of independent directors was installed, but had no power to veto the tender offer, only to issue a recommendation to the shareholders to accept or reject the offer.[[180]](#footnote-180) The plaintiffs filed a preliminary injunction to enjoin the tender offer, claiming that the entire fairness standard of *Kahn* applied and was not fulfilled. However, the court ruled that the less strict standard of *Siliconix* applied, at least if there is no coercion.[[181]](#footnote-181) The court stated that three conditions must be fulfilled for the two-step freeze-out to fulfil the “no coercion test” and hence avoid the entire fairness review: (1) a non-waivable condition of majority of the minority approval, (2) a guarantee from the bidder that he will promptly freeze out the minority shareholders at the same conditions as those offered in the tender offer, and (3) no retributive threats from the bidder towards the directors of the target.[[182]](#footnote-182) In addition, the independent directors should have enough time and discretion to make a recommendation to the minority shareholders, should be able to hire their own financial and legal advisors, and should disclose adequate information.[[183]](#footnote-183) When there is no coercion as described, the tender offer is not subject to an entire fairness review.

In casu, however, the offer was considered coercive, as the “majority of the minority clause” was imperfect: the definition of minority shareholders in the clause included shareholders that were affiliated with the controlling shareholder Unocal.[[184]](#footnote-184) Finally, it should be noted that a special committee with a “right to say no” is no part of the ruling in *Pure Resources*, while this is required to shift the burden of proof of entire fairness to the plaintiff for one-step freeze-outs under *Kahn*.

1. ***Pure Resources* – rationale.** Vice Chancellor Strine, the judge who decided the *Pure Resources* case, developed an elaborate justification for his ruling.[[185]](#footnote-185) He notes the disparate legal treatment of one-step and two-step freeze-outs, even though they reach economically similar results. The traditional justification for this discrepancy was that statutory law does not provide for a role for the board of directors in tender offers, in contrast with mergers.[[186]](#footnote-186) But Strine counters this argument by showing that the common law has developed an active role for the board in the context of hostile tenders offers.[[187]](#footnote-187) By analogy, the common law could develop a similar active role for the board in the context of freeze-outs.

Then, Strine compares the threat of coercion that is present in both types of freeze-outs. He notes that in the *Kahn* line of case law, the Delaware Supreme Court has subjected these one-step freeze-outs to an entire fairness review. Procedural safeguards such as the special committee of independent directors and a majority of the minority approval only help to shift the burden of proof to the plaintiff. Strine argues that the Delaware Supreme Court decided in this way because it views the controlling shareholder as a “800-pound gorilla” that can threaten and punish minority shareholders if they do not accept the tender offer.[[188]](#footnote-188) This would then justify an entire fairness review, even if the procedural safeguards were met, because there still is an “inherent coercion” in one-step freeze-outs.[[189]](#footnote-189)

But Strine notes that the 800-pound gorilla is just as much threatening in tender offers and two-step freeze-outs.[[190]](#footnote-190) There might even be a greater threat, as unlike for mergers where the shareholders vote collectively, accepting or rejecting a tender offer is an individual decision. Indeed, it has been argued that minority shareholders might be subject to a variation of the prisoner’s dilemma[[191]](#footnote-191), the “pressure to tender problem”: minority shareholders tender their shares even if they consider the bid too low, out of fear of being stuck with less liquid and hence less valuable minority shares.[[192]](#footnote-192)

Strine is troubled by this disparate legal treatment of both freeze-out types, which in his opinion is not justified by sound policy reasons.[[193]](#footnote-193)However, he does not believe that the law on freeze-outs should converge to the stringent entire fairness test of *Kahn*, but rather to the more flexible standard of *Siliconix*.[[194]](#footnote-194) More precise, he suggests that *“the lack of harmony is better addressed in the Lynch* [what we call *Kahn*] *line, by affording greater liability-immunizing effect to protective devices such as majority of the minority approval conditions and special committee negotiation and approval.”*

1. **Two-step freeze-outs - conclusions.** In conclusion, the case law one two-step freeze-outs has developed along a path that is more flexible than that of one-step freeze-outs, which makes them very attractive for practice, but perhaps a danger for minority shareholders. In *Pure Resources,* Vice Chancellor Strine showed himself a proponent of convergence of the standards of review for one-step and two-step freeze-outs. He already improved protection of minority shareholders in two-step freeze-outs by concretizing the coercion test with the three conditions described above. If these conditions are met, the business judgment rule applies.

### Doctrinal debate on convergence towards a unified regime

1. **One-step vs. two-step freeze-outs.** After *Pure Resources*, the different treatment can be summarized as follows: one-step freeze-outs are subject to an entire fairness review, with the burden of proof being on the defendant (the controlling shareholder). However, if a majority of the minority condition and a special committee of independent directors are included in the transaction, the burden of proof shifts to the plaintiff (the minority shareholders). Two-step freeze-outs, on the other hand, can escape an entire fairness review if there are no disclosure violations and no coercion. No coercion in this context means (since *Pure Resources*) that three conditions are met: (1) a non-waivable condition of majority of the minority approval, (2) a guarantee from the bidder that he will promptly freeze out the minority shareholders at the same conditions as those offered in the tender offer, and (3) no retributive threats from the bidder towards the directors of the target.

In conclusion, the main point of difference between one-step and two-step freeze-outs is that the special committee of independent directors is not required to have veto power for two-step freeze-outs. It only has the ability to recommend the tender offer or not, unlike as in one-step freeze-outs.[[195]](#footnote-195) This is very important, because the special committee can only act effectively as a bargaining agent for minority shareholder to protect them from low-ball offers if it has the power to say no.

In addition, the different standard that remains for one-step freeze-outs (entire fairness review) and two-step freeze-outs (business judgment rule) also has important consequences: the business judgment rule makes it much more likely that a suit is dismissed in a preliminary ruling.[[196]](#footnote-196) This also proven by empirical evidence: minority shareholders receive a lower return in two-step freeze-outs than in one-step freeze-outs (as will be discussed in paragraph 97).[[197]](#footnote-197)

Therefore, important differences remain between one-step and two-step freeze-outs after *Pure Resources*. This difference in treatment between a one-step and a two-step freeze-out has been criticized in the literature, as both types of freeze-outs reach the same result, but with a different standard of protection of minority shareholders. As such, this is not necessarily a problem, as Delaware law knows the “doctrine of independent legal significance”: if there are multiple transactional routes to the same destination, it is valid to opt for the least onerous route.[[198]](#footnote-198) Nevertheless, there is a lively debate in the literature whether this disparate treatment of both types of freeze-outs is wise from a policy perspective.

1. **Overview of legal doctrine.** The academic debate on whether the law on freeze-outs should converge, and if so, to what point, can be structured into three positions[[199]](#footnote-199): (1) adherence to the status quo (with the divergence between the *Kahn* and *Siliconix* lines of cases)[[200]](#footnote-200); (2) convergence towards the entire fairness review (*Kahn* line of cases)[[201]](#footnote-201); and (3) convergence towards a hybrid solution (partly overruling both *Kahn* and *Siliconix*)[[202]](#footnote-202).
2. **The status quo.** The first position in the literature defends the status quo, i.e. the differential treatment of one-step and two-step freeze-outs.[[203]](#footnote-203) There are four basic arguments for this position.[[204]](#footnote-204) First, the argument goes that minority shareholders can decide freely whether to accept or reject a tender offer, and hence are more protected in a two-step freeze-out.[[205]](#footnote-205) However, we have already noted above Vice Chancellor Strine’s counterargument against this: tender offers by controlling shareholders are just like mergers coercive for the minority shareholders due to the threat of the 800-pound gorilla (the controlling shareholder) and due to the pressure to tender problem.[[206]](#footnote-206) In addition, empirical evidence by Subramanian suggests that the returns for minority shareholders are significantly lower in tender offers (two-step freeze-outs) than in mergers (one-step freeze-outs), indicating that there is less protection in two-step freeze-outs.[[207]](#footnote-207) Restrepo has also provided empirical evidence that this difference is attributable to the *Siliconix* case law.[[208]](#footnote-208)

Second, we have already mentioned the argument made in *Siliconix* that statutory corporate law does not provide for any role for the board of directors in tender offers, in contrast with mergers.[[209]](#footnote-209) This argument was also countered by Strine in *Pure Resources:* as the common law has developed an active role for the board in the context of hostile tenders offers, it could develop a similar active role for the board in the context of freeze-outs.[[210]](#footnote-210)

Third, Pritchard has argued that minority shareholder know that they can be frozen out by a controlling shareholder, and they will take that risk into account when buying shares.[[211]](#footnote-211) Therefore, from an *ex ante* perspective, minority shareholders simply pay less for their shares and a flexible regime for two-step freeze-outs does not redistribute gains between controlling shareholders and minority shareholders. However, this argument has been criticized, because minority shareholders will probably not know exactly what the applicable standard of review is.[[212]](#footnote-212) In addition, from a societal perspective, allowing freeze-outs with the current flexible regime could potentially facilitate inefficient freeze-outs, causing a social welfare loss (see further in paragraph 101 and following).[[213]](#footnote-213)

Finally, it is argued that an entire fairness review is incompatible with the legislative intent behind short-form mergers.[[214]](#footnote-214) Supposedly, the different treatment of both types of freeze-outs is justified by a different transaction structure, with both types of freeze-outs being allowed by the legislator. In addition, the legislative intent behind the back-end short-form merger was to allow quick and easy mergers without judicial intervention. However, this whole argument ignores that the transaction as a whole (both steps taken together) accomplishes the same effect as the one-step freeze-out and that there is an inherent coercion in this type of transactions. In addition, the Delaware courts have often built further upon statutory law in the past to provide for additional protection for minority shareholders, so there seems to be little reason why this could not also be the case for freeze-outs.

1. **Convergence towards an entire fairness review.** Another position in legal doctrine argues that two-step freeze-outs should be subjected to an entire fairness review, just like one-step freeze-outs.[[215]](#footnote-215) These authors thus propose a convergence towards an entire fairness review. The main argument for this is one of doctrinal consistency[[216]](#footnote-216): self-dealing transactions are usually subject to an entire fairness review, and two-step freeze-out transactions are self-dealing transactions just like one-step freeze-outs. The fact that a different route is used is irrelevant in this respect. Indeed, the threat of retaliation by the controlling shareholder (the 800-pound gorilla) is the same for both types, and the pressure to tender problem might even make two-step freeze-outs less protective than one-step freeze-outs.[[217]](#footnote-217) This claim is disputed by Pritchard, which states that the controlling shareholder *“is not much of a threat”*.[[218]](#footnote-218) Nevertheless, the existence of a coercive threat to minority shareholders is also backed by empirical evidence (see above in paragraph 97).[[219]](#footnote-219)

The counterargument against convergence towards an entire fairness review is that this standard leads to a lot of litigation and is therefore very costly.[[220]](#footnote-220) Second, doctrinal consistency can just as well be reached through converging towards the business judgment rule instead of the entire fairness review.[[221]](#footnote-221) Moreover, an entire fairness review for all freeze-outs could deter value-creating transactions (see further in paragraph 101 and 103).

1. **Convergence towards a hybrid solution.** The final position in the debate on the standard of review for freeze-outs argues for a hybrid approach: the entire fairness review applies to some cases, while the business judgment rule applies if certain procedural safeguards are met.[[222]](#footnote-222) More specifically, both Gilson & Gordon[[223]](#footnote-223) and Subramanian[[224]](#footnote-224) have proposed the following solution, although for different reasons: freeze-outs must meet the entire fairness test, unless they are approved by a majority of the minority and by a special committee of independent directors with veto power, in which case the business judgment rule applies. This solution applies to both one-step and two-step freeze-outs. Particularly, the controlling shareholder must negotiate with a special committee of independent directors with veto power if it wants to freeze out minority shareholders. If the special committee rejects the freeze-out proposal, the controlling shareholder can still override its veto, but then the transaction will be subject to an entire fairness review. Finally, the inclusion of either the majority of the minority approval or the special committee, but not both, would still shift the burden of proof of entire fairness to the plaintiff, as decided in *Getty Oil* and *Kahn*.[[225]](#footnote-225)
2. **Rationale behind the hybrid solution.** The rationale behind the hybrid solution is that the procedural safeguards help to simulate arms-length transactions: approval by a (disinterested) board and approval by (disinterested) shareholders.[[226]](#footnote-226) The special committee serves as the bargaining agent for the shareholders, just like in an independent transaction. However, if the controlling shareholder chooses to ignore the veto of the special committee, the minority shareholders are no longer protected as in independent transactions, and this must be corrected by the more stringent entire fairness test.
3. **Subramanian’s additional justification.** Subramanian has added an additional reason to justify this hybrid solution, because the reasoning described above does not explain why the problem of diverging standards cannot be solved by a lower price for shares *ex ante*.[[227]](#footnote-227) Indeed, minority shareholders could just discount the possibility of a two-step freeze-out in the future by paying a lower price. Subramanian argues that the current disparate treatment creates inefficiencies for society (“social welfare costs”) by facilitating inefficient (value destroying) two-step freeze-outs through the too lenient *Siliconix* line of cases, and preventing efficient (value creating) one-step freeze-outs through the too stringent *Kahn* line of case.[[228]](#footnote-228) Or put more simply: some companies that should have gone private do not go private, while other who should not have gone private do go private.
4. **Subramanian’s critique on *Siliconix*.** Subramanian argues that the problem with the *Siliconix* line of cases on two-step freeze-outs is that the special committee has no veto power, but only the ability to make a recommendation.[[229]](#footnote-229) The only remedy is the appraisal remedy, which has many disadvantages (see the discussion above in part 3.3). This means that the price of the tender offer in a two-step freeze-out is primarily based on the market price, as the bidder only needs to offer slightly more than the market price, in order to reach the 90% threshold. There is no bargaining agent like the special committee of independent directors that can bargain for a higher price, and it is unlikely that the court will award a higher price than the market price in an appraisal procedure.[[230]](#footnote-230) However, the problem with this is that the controlling shareholder might try to opportunistically exploit the information symmetry that exists between controlling and minority shareholders. He might time the freeze-out when the market price is low, or he might even try to manipulate the market price. Subramanian shows that this creates inefficiencies for society.[[231]](#footnote-231) Therefore, we need to detach the offer price from the market price, which can be achieved through a special committee with veto power in combination with an entire fairness review if the special committee is ignored,[[232]](#footnote-232) as is accomplished by the hybrid solution.
5. **Subramanian’s critique on *Kahn*.** But the *Kahn* line of cases on one-step freeze-outs is also criticized by Subramanian.[[233]](#footnote-233) Here, the problem is that the special committee always has a veto right, which it might use to block a value increasing freeze-out proposals based on its personal interest.[[234]](#footnote-234) Indeed, the special committee will probably lose its job after the freeze-out and has an incentive to bargain hard to be better protected from litigation. In addition, even if there is a special committee, the entire fairness test still applies, which leads to higher litigation costs.[[235]](#footnote-235) Both factors lead to the conclusion that value increasing transactions might be deterred by a too strict regime on one-step freeze-outs.
6. **Hybrid solution – conclusion.** In conclusion, Subramanian argues for a hybrid solution, based on the same procedural safeguards as with an “at arm’s length” transaction: if the transaction is approved by a disinterested board and by disinterested shareholders, the business judgment rule applies; if not, the entire fairness test applies.[[236]](#footnote-236) If one of the procedural safeguards is applied, but not the other, the standard remains entire fairness, but the burden shifts to the plaintiff, as is currently the case under *Kahn* and *Getty Oil* for one-step freeze-outs.[[237]](#footnote-237) If the special committee is not willing to approve the freeze-out, the walk-away alternative of the controlling shareholder is to launch a direct tender offer to the minority shareholders, but this will be subject to an entire fairness review.[[238]](#footnote-238)

Both procedural safeguards have a different function: while independent board approval functions as a bargaining agent for the minority shareholders who allocates the surplus of the transaction, approval by the shareholders functions as a market check against disloyal behaviour of the board.[[239]](#footnote-239) This hybrid solution overrules both the *Kahn* line of case law (by applying the business judgment rule if there is a special committee and approval by a majority of the minority) and the *Siliconix* line of case law (by strengthening the special committee’ veto power). The solution would increase the efficiency of the law on freeze-outs, according to subramanian.

### Case law on convergence towards a unified regime

1. **Unified approach.** In some recent judgments, the Delaware Chancery Court has followed the hybrid solution proposed by Gilson & Gordon[[240]](#footnote-240) and Subramanian[[241]](#footnote-241): a unified standard of entire fairness for both types of freeze-outs, unless there is both a condition of majority of the minority approval and a special committee of independent directors that negotiates the transaction, in which case the business judgment rule applies.[[242]](#footnote-242) It remains the question, however, whether the Delaware Supreme Court will uphold this case law.
2. ***Cox Communications*.** The first signal in the case law that Delaware law was converging towards a unified regime on freeze-outs can be found in *Cox Communications*[[243]](#footnote-243). In this case, which is actually about an objection to the attorney fees in the class action against a one-step freeze-out, Vice Chancellor Strine argues in an obiter dictum for a unified regime. In his reasoning, he relies *inter alia* on the expert testimony and some of the articles of Subramanian[[244]](#footnote-244) discussed above. More specifically, Strine agrees with Subramanian that one-step freeze-outs should be reviewed under the business judgment rule if there is an approval by both the special committee of independent directors and a majority of the minority shareholders.[[245]](#footnote-245)

Strine argues that this proposal does not conflict with *Kahn*, as the Delaware Supreme Court never ruled on the effect of adopting both procedural safeguards, but only on adopting one of them.[[246]](#footnote-246) The problem with the current interpretation of *Kahn* (as discussed above in paragraph 85) is that it does not provide for an incentive to use a majority of the minority condition, as this does not provide an additional benefit if there is a special committee.[[247]](#footnote-247) Another problem is that it is impossible to dismiss these cases on the pleadings, because the entire fairness review will still apply, which gives even frivolous cases a certain settlement value.[[248]](#footnote-248)

Finally, Strine also proposes to apply this same regime to two-step freeze-outs.[[249]](#footnote-249) This would mean that not only the three conditions of *Pure Resources* (including the majority of the minority approval) would need to be fulfilled to avoid entire fairness, but also approval by a special committee of independent directors. Hence, Strine’s proposal amounts to a unification of the law on going private freeze-outs.

1. **One-step freeze-outs: *Hammons* and *MFW.*** The unified approach proposed by Strine in the obiter dictum of *Cox Communications* was later accepted for one-step freeze-outs. In *In re John Q. Hammons Hotels Inc. Shareholder Litigation[[250]](#footnote-250),* the Delaware Chancery Court ruled in a case concerning a one-step freeze-out that the use of both procedural protections (a special committee and a majority of the minority) leads to the application of the business judgment rule instead of the entire fairness review.[[251]](#footnote-251)

Chancellor[[252]](#footnote-252) Strine came to the same conclusion in *In re MFW Shareholders Litigation[[253]](#footnote-253)*. Like in *Cox Communications*, he ruled that the unified approach *“will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection”[[254]](#footnote-254).* This ruling in *MFW* was later confirmed by the Delaware Supreme Court.[[255]](#footnote-255) Therefore, the applicability of the unified approach to one-step freeze-outs seems clearly accepted in the case law.

1. **Two-step freeze-outs: *CNX* vs*. Cox Radio*.**The Delaware Chancery Court also accepted the unified approach for two-step freeze-outs in a ruling on a motion for preliminary injunction in *In Re CNX Gas Corp. Shareholders Litigation*[[256]](#footnote-256). The Delaware Supreme Court, however, refused the appeal against this ruling, because it was not yet a final judgment.[[257]](#footnote-257) Because the case was soon settled afterwards, the Delaware Supreme Court did not get the chance to express its opinion on this case.[[258]](#footnote-258)

In contrast, in *In Re Cox Radio[[259]](#footnote-259),* a case on the determination of the fee of the plaintiff’s lawyers in a two-step freeze-out, Vice Chancellor Parsons did not apply the unified approach, but applied the less stringent standard of *Pure Resources*. The Delaware Supreme Court affirmed the ruling in *Cox Radio[[260]](#footnote-260)*, but it refused to express its opinion on the applicable standard of review, because it would have approved the settlement either way. The resulting conclusion of these cases is that the applicability of the unified approach to two-step freeze-outs is still not clearly decided by the Delaware Supreme Court.

1. **Response by practice to the unified approach**. The case law discussed above indicates a trend towards accepting the unified approach, even though this is still uncertain, especially for two-step freeze-outs. Empirical data from Restrepo & Subramanian indicates that practice has already complied with the unified approach: the proportion of two-step freeze-outs has declined, the price difference between one-step and two-step freeze-outs has disappeared, and more “majority of the minority” conditions are used, as was predicted by proponents of the unified approach.[[261]](#footnote-261)

Nevertheless, Restrepo & Subramanian also conclude that the Delaware Supreme Court should clearly finish the job to provide more certainty and further strengthen the results.[[262]](#footnote-262)

1. **Reception of the unified approach in doctrine.** Restrepo & Subramanian welcome this case law on the unified approach and ask the Delaware Supreme Court to confirm this case law to provide for more certainty.[[263]](#footnote-263) They point to the welfare loss associated with the disparate treatment that existed earlier, which was identified by Subramanian[[264]](#footnote-264) (see the discussion above in paragraph 101).

Other authors, such as Gupta, remain critical for the unified approach.[[265]](#footnote-265) They argue that two-step freeze-outs should be treated more flexibly, as under the *Pure Resources* case law. They point out that complying with the procedural requirements is costly and inefficient. But this point of view ignores the need for a level of minority protection that is equal to at arm’s length transactions and the empirical evidence discussed above.

1. **Conclusion.** In conclusion, the case law has clearly accepted the unified approach for one-step freeze-outs, but remains unclear for two-step freeze-outs. However, Restrepo & Subramanian have found that practice already has complied with the unified approach. While some authors welcome the trend towards a unified approach, others have criticized it. We believe that the unified approach is a more consistent and more efficient approach from a societal perspective, as it it protects minority shareholders in a similar way as in an arms-length transaction (see further in paragraph 255).

## Post-acquisition freeze-outs

1. **Introduction.** In chapter 2 of this master thesis, we distinguished going private freeze-outs from post-acquisition freeze-outs, *i.e.* freeze-outs that serve to freeze out any remaining minority shareholders after a takeover bid by an independent party.[[266]](#footnote-266) This is different from a going private freeze-out, where the controlling shareholder has already had control over the target company for some time, but now wants to become the sole shareholder.
2. **Principle of flexible treatment.** We have already mentioned the argument of Brudney & Chirelstein and Greene that the legal treatment of post-acquisition freeze-outs should be more flexible, because they are preceded by an at arm’s length transaction.[[267]](#footnote-267) Brudney & Chirelstein put this very simply: *“Two-step takeovers* [*i.e.* a takeover bid followed by a post-acquisition freeze-outs as defined in this master thesis], *being acquisitions by outsiders, are not properly to be viewed as freezeouts in the first place.”*[[268]](#footnote-268) Indeed, post-acquisition freeze-outs should be viewed as the second step of the execution of a transaction with an independent party, and not as a self-dealing transaction like a going private freeze-out, if certain conditions are met.[[269]](#footnote-269) Therefore, the standard of review should also be the business judgment rule, and not the entire fairness review.
3. **Conditions for flexible treatment.** The conditions for this flexible treatment of post-acquisition freeze-outs are that the tender offer must be launched by an independent party instead of a controlling shareholder and that it must be accepted by a majority of the shareholders. In addition, the post-acquisition freeze-out must be made at the same price as the preceding tender offer, announced in the tender offer, and executed promptly after the tender offer to eliminate any differences in consideration due to the time value of money or fluctuations in share price.[[270]](#footnote-270) If these conditions are fulfilled, it is clearly the second step of an independent transaction, which deserves review under the flexible business judgment rule.
4. **Possible critique.** Some might contend that the preceding tender offer might not guarantee a fair price, for example because of the pressure to tender problem.[[271]](#footnote-271) While there is some merit to this critique, this is true for all tender offers, even those not followed by a freeze-out. Nevertheless, we agree that the proposals suggested by the law and economics literature to solve the pressure to tender problem should also be adopted (see further in paragraphs 235 and 250).
5. **Little discussion in literature.** Strangely enough, post-acquisition freeze-outs have not been discussed extensively in the literature after the articles of Brudney & Chirelstein and Greene. Rather, the focus has been on going private freeze-outs, which has attracted a huge attention in case law and legal doctrine, as is clear from the parts above. This seems to indicate that the topic of post-acquisition freeze-outs has become uncontroversial. Indeed, Subramanian mentions that “*the second step* [of a third-party tender offer] *is invariably at the same price as the first step and the first step was negotiated at arms length*.”[[272]](#footnote-272) He also notes that post-acquisition freeze-outs are clearly distinguishable from going private freeze-outs in his sample of freeze-outs.[[273]](#footnote-273)
6. **Comparison with procedural safeguards in going private freeze-outs.** It might seem strange that post-acquisition freeze-outs are treated so flexibly in comparison with going private freeze-outs, where so much importance is attached to procedural safeguards such as approval by special committee of independent directors and by a majority of the minority shareholders. However, if we look functionally at post-acquisition freeze-outs, we can conclude that these procedural safeguards are also present here, but in the first step. Indeed, the preceding tender offer will have to be negotiated and approved by the board, which is at that moment independent from the bidder and which can adopt poison pills and other takeover defences to block the transaction if need be.[[274]](#footnote-274) In addition, the bidder will have to acquire a majority of the shares from the shareholders in order for a post-acquisition freeze-out merger to be possible. Therefore, it makes sense that if a jurisdiction allows going private freeze-outs, it will also allow post-acquisition freeze-outs without additional procedural safeguards.
7. **Possibility of freeze-outs as such.** Of course, this reasoning only applies under the assumption that freeze-outs as such should be possible. Another possible view would be that freeze-outs are a violation of the property rights of minority shareholders, and hence should never be possible (or only in very exceptional circumstances). This comes closer to the view that is accepted in Europe.[[275]](#footnote-275) However, in the United States, a shareholder is viewed more as an investor with a purely financial interest than as a holder of property rights (cfr. further in paragraph 211). Therefore, the possibility of freeze-outs as such is uncontroversial in modern day Delaware corporate law.

## Conclusions

1. **Overview.** In this chapter, we have discussed the law on freeze-outs in the United States, and especially in Delaware. We discussed the two main protections against freeze-outs: the appraisal remedy, which we discovered to be insufficient to protect minority shareholders, and a suit for breach of the fiduciary duties of directors and shareholders. We focused on the latter. After an introduction to fiduciary duties in general, we have discussed the case law and doctrine concerning fiduciary duties in going private freeze-outs and in post-acquisition freeze-outs in detail.
2. **Going private freeze-outs.** Originally, the Delaware case law led to a disparate treatment of one-step and two-step going private freeze-outs: while the first was subject to the stringent entire fairness test established by *Weinberger* and *Kahn*, the latter enjoyed the more lenient standard of review of the business judgment rule as determined by *Siliconix.*

However, later developments closed the gap between the legal treatment of both types of going private freeze-outs. In *Pure Resources*, the Delaware Chancery Court enhanced the protection of minority shareholders through a more detailed coercion test. In addition, Gilson & Gordon[[276]](#footnote-276) and Subramanian[[277]](#footnote-277) proposed a unified standard of review: freeze-outs should be subject to an entire fairness review, unless there is both a condition of majority of the minority approval and a special committee of independent directors that negotiates the transaction, in which case the business judgment rule applies.

This unified approach was endorsed by Vice Chancellor Strine in an obiter dictum in *Cox Communications*, and was applied in later case law of the Delaware Chancery Court. However, the unified approach has not yet been affirmed for two-step freeze-outs by the Delaware Supreme Court. Despite this uncertainty, Restrepo & Subramanian[[278]](#footnote-278) have provided empirical evidence that practice has already complied with the unified approach.

Subramanian[[279]](#footnote-279) has provided a normative answer to why the unified approach is most efficient from a societal perspective, but other authors disagree[[280]](#footnote-280). However, Subramanian’s approach seems most convincing and is followed by the case law.

1. **Post-acquisition freeze-outs.** In contrast with going private freeze-outs, there is much less controversy about post-acquisition freeze-outs. Post-acquistion freeze-outs are allowed if they are executed at the same conditions as the preceding tender offer and promptly after it. The rationale for this is that the combination of the tender offer and the post-acquisition freeze-out merger possesses the characteristics of an at arm’s length transaction: approval by an independent board of directors and by a majority of the disinterested shareholders. Therefore, there is no need to demand additional procedural safeguards for the second step post-acquisition freeze-outs, such as approval by special committee of independent directors and by a majority of the minority shareholders, unlike for going private freeze-outs. Indeed, this is already present in the very structure of the tender-offer / post-acquisition freeze-out transaction.

This flexible treatment is a logical consequence of allowing cash mergers to be used as a freeze-out technique at a threshold of a simple majority of outstanding shares. However, in Europe, the possibility of a freeze-out is as such more contested, which is why the regime there is less flexible (see further in chapter 4).

1. **Take away point.** From this chapter we take away that the law on freeze-outs in the United States is well developed through a vast body of case law and literature. The flexibility of cash mergers with a simple majority is accompanied by various procedural safeguards to protect minority shareholders. While there is still an intense debate on the adequate level of minority protection in different types of freeze-outs, the mechanism itself of freeze-out mergers seems undisputed, quite different from what is the case in Europe. We will now turn to this European perspective in the next chapter.

# Freeze-outs in Europe

## Introduction

1. **Overview.** The topic of freeze-outs is not unknown in Europe and is covered in the literature by some authors.[[281]](#footnote-281) There are considerable differences with the law on freeze-outs in the United States. In the following parts, we will study the harmonized European rules of the Merger Directive and the Takeover Directive that are relevant to freeze-outs, as well as their implementation into Dutch and Belgian law. We will also study the limits imposed on freeze-outs by the right to property in article 1 FP ECHR and the case law of the European Court of Human Rights. The use of so-called alternative freeze-out techniques will be discussed separately in chapter 5 (for the Netherlands) and chapter 6 (for Belgium). A comparison with the law in the United States is postponed until chapter 7.

## Merger Directive

1. **Absence of cash mergers.** Unlike in the United States, cash mergers are generally unavailable in the European Union.[[282]](#footnote-282) Articles 3 and 4 of the Merger Directive[[283]](#footnote-283) stipulate that cash payments in a merger may not exceed 10% of the nominal value or the accounting par value of shares. Nevertheless, member states can opt to allow mergers with cash payments of more than 10%.[[284]](#footnote-284) In such case, some of the rules of the directive will also apply to those transactions (cfr. article 30 Merger Directive). However, to our knowledge and based on the literature consulted, no country in the EU allows full cash mergers and certainly not Belgium[[285]](#footnote-285) or the Netherlands[[286]](#footnote-286).[[287]](#footnote-287) Cash mergers would not enjoy the fiscal neutrality of the Merger Directive, which could also explain why member states are hesitant to introduce this transaction structure.[[288]](#footnote-288)
2. **General principle.** The idea behind the prohibition of cash mergers is the general principle that a shareholder’s rights cannot be taken without his consent.[[289]](#footnote-289) This is an idea that is still very much alive in Europe, despite the squeeze-out provisions discussed below in part 4.4. This idea is perfectly illustrated by the following quote: *“L'actionnaire est membre de la société; il ne peut pas être privé de cette qualité parce qu'il y aurait là une véritable expropriation. C'est seulement avec son consentement que son droit peut disparaître.”[[290]](#footnote-290)* This is at odds with the American view of a shareholder as an investor that is only interested in the (purely financial) fair value of his shares (see further in paragraph 211).[[291]](#footnote-291)

## Alternative freeze-out techniques

1. **Alternative freeze-out techniques.** Notwithstanding the lack of cash mergers, some European countries allow other techniques than the squeeze-out provisions to be used as freeze-out techniques. In this master thesis, we refer to these techniques as “alternative freeze-out techniques”. For example, The United Kingdom knows the “scheme of arrangement”, which can be used to effect a merger or to alter rights of the shareholders, but also to remove minority shareholders.[[292]](#footnote-292) These schemes have to be approved by 75% of the shareholders at the shareholders’ meeting and by the court.[[293]](#footnote-293) Nevertheless, the courts are reluctant to accept a scheme of arrangement as a freeze-out technique.[[294]](#footnote-294)

In addition, Germany knows the “*Unternehmensverträge*” (enterprise agreement), which allows a parent company to take full control of its subsidiary if it owns more than 75% of the shares.[[295]](#footnote-295) However, Ventoruzzo notes that both these alternative freeze-out techniques are “*generally ineffectual, exist in only a handful of member states, and lack harmonization*”.[[296]](#footnote-296) Indeed, both courts and practice are reluctant to accept the use of these transactions as freeze-outs. For this reason, these techniques are not included in the present research.

1. **Stock mergers and de facto mergers as an alternative freeze-out technique.** As discussed above in part 2.2, other techniques such as a regular stock merger or de facto merger can be used to freeze-out minority shareholders.[[297]](#footnote-297) However, in such case, minority shareholders might sue for a breach of fiduciary duties or for “abuse of majority”, and the rules on conflicts of interest might apply.[[298]](#footnote-298) In addition, minority shareholders might also have appraisal rights in some European countries (for example Italy), but this is not harmonized in Europe.[[299]](#footnote-299) Belgium and the Netherlands, for example, do not know appraisal rights against mergers.[[300]](#footnote-300) Finally, minority shareholders are protected by the procedural safeguards that are mandatory for mergers. For example, article 10 of the Merger Directive stipulates that the exchange ratio must be fair and must be approved by a court-appointed independent expert.[[301]](#footnote-301) The remedies against these alternative freeze-out techniques are discussed in more detail for Dutch and Belgian law in respectively chapter 5 and chapter 6.

## Takeover directive (“squeeze-outs”) and national implementation

### Squeeze-outs under the Takeover Directive

1. **“Squeeze-outs”.** Mergers are not the most “normal” freeze-out technique in Europe. Indeed, article 15 of the Takeover Directive[[302]](#footnote-302) introduced a squeeze-out procedure, which allows bidders to force minority shareholders to transfer their shares within three months after a takeover bid if they reach a certain threshold of shares. The underlying goal was to increase takeover activity by making it easier for bidders to acquire 100% of the shares of a company.[[303]](#footnote-303)
2. **Threshold.** Member states can opt to set a single threshold between 90 and 95% of the capital carrying voting rights and the securities with voting rights. Alternatively, member states can set an acceptance rate threshold of 90% of the capital with voting rights and the securities with voting rights, meaning that 90% of the shares included in the bid must have been tendered (article 15(2) Takeover Directive).[[304]](#footnote-304) We will refer to these options as respectively the “single threshold” and the “acceptance rate threshold”.
3. **Fair price.** Squeeze-outs must be exercised at a fair price and with the same form of consideration as in the preceding bid, or in cash, which is always allowed (article 15(5) Takeover Directive). The bid price is presumed to be fair in case of a mandatory bid, because then article 5(4) of the Takeover Directive determines how a fair price should be set for the bid. The bid price is also presumed to be fair in case of a voluntary bid if more than 90% of the shares included in the bid have been tendered (article 15(5) Takeover Directive). There is some discussion in the literature on whether this presumption is rebuttable.[[305]](#footnote-305)

Some authors, such as Kaisanlahti, have argued that the threshold of 90% is too high and that a simple “majority of the minority” should suffice to establish a presumption of a fair price, analogous with the *Kahn* line of case law in the United States discussed above.[[306]](#footnote-306) This critique will be discussed in paragraph 249.

These rules on the determination of a fair price are aimed at preventing “front-loaded” acquisitions, where the preceding takeover bid provides for a higher price than the squeeze-out, pressuring minority shareholders into tendering their shares.[[307]](#footnote-307) Outside these situations, member states are free to set rules governing the determination of the squeeze-out price, for example by requiring that it is determined by the financial supervisor, a court or an independent expert.[[308]](#footnote-308)

1. **No complete harmonization.** From the paragraphs above it appears that squeeze-outs are not completely harmonized in Europe. Indeed, the thresholds for the squeeze-outs and the determination of the fair price still leave some room for differences between member states. This has been subject to critique in the literature.[[309]](#footnote-309)

In addition, it should be noted that many member states also have squeeze-out provisions outside the situation of takeover bids, which are not harmonized by European Union law.[[310]](#footnote-310) These “stand-alone” squeeze-outs are usually available at a threshold of 95% and the consideration offered is usually subject to the supervision of an independent expert, the financial supervisor or a court.[[311]](#footnote-311)

Because there is no complete harmonization of squeeze-outs in the European Union, we now turn to the domestic law of Belgium and the Netherlands on squeeze-outs. However, we will only discuss these techniques briefly, since they are already extensively covered in the existing literature.

### Squeeze-outs under Dutch law

1. **Stand-alone squeeze-outs.** In the Netherlands, there are two basic types of squeeze-outs: the stand-alone squeeze-out and the post-takeover squeeze-out.[[312]](#footnote-312)The stand-alone squeeze-out is possible outside the situation of a takeover bid and is governed by article 2:92a of the Dutch Civil Code. A stand-alone squeeze-out is possible when a shareholder (or a group of shareholders) owns at least 95% of the issued capital (article 2:92a §1 Dutch Civil Code). Squeeze-outs have to be approved by the Commercial Chamber of the Amsterdam Court, who also determines the price of the squeeze-out. The judge is free to decide on the method of valuation and can take into account evidence presented by the bidder.[[313]](#footnote-313) The court can also appoint one or three independent experts to value the shares (article 2:92a §5 Dutch Civil Code). Finally, minority shareholders who do not agree with the price set by the judge can appeal to the Dutch Supreme Court.[[314]](#footnote-314)
2. **Post-takeover squeeze-out.** After a takeover bid, the bidder can reopen the bid once to acquire more shares (article 15 Takeover Bids Decree[[315]](#footnote-315)). In addition, the Netherlands also have a post-takeover squeeze-out procedure, which is governed by article 2:359c Dutch Civil Code. This squeeze-out must be requested by the bidder within three months of the end of the acceptance period of the takeover bid (article 2:359c §3 Dutch Civil Code). The threshold for this squeeze-out is that the bidder has acquired with a takeover bid at least 95% of the issued capital and 95% of the issued voting rights (article 2:359c §1 Dutch Civil Code). As is the case for the stand-alone squeeze-out, the Commercial Chamber of the Amsterdam Court has to approve the squeeze-out and determines the price (article 2:359c §4 and §6 Dutch Civil Code). However, as prescribed by the Takeover Directive, there is a presumption of a fair price if there is an acceptance rate of at least 90% in case of a voluntary bid, or in case of a mandatory bid (article 2:359c, §6 Dutch Civil Code). The court can also appoint one or three independent experts. The consideration has to be paid in cash.

### Squeeze-outs under Belgian law

1. **Stand-alone squeeze-out.** Like the Netherlands, Belgium also knows two types of squeeze-outs: the stand-alone squeeze-out and the post-takeover squeeze-out.[[316]](#footnote-316) The stand-alone squeeze-out is possible even outside the situation of a takeover bid and is governed by article 513 §1 of the Belgian Companies Code and by the Squeeze-out Decree[[317]](#footnote-317). According to article 3 of the Squeeze-out Decree, a stand-alone squeeze-out is only possible if the shareholder (or the group of shareholders acting in concert for the purpose of the squeeze-out) meets the single threshold of at least 95% of the securities carrying voting rights.

The consideration in a stand-alone squeeze-out can only be in cash (article 2, 3° Squeeze-out Decree) and is in principle determined by the bidder.[[318]](#footnote-318) As there is no successful preceding takeover bid that was accompanied by a prospectus and that can function as a presumption of a fair price, there are some additional obligations for the bidder.[[319]](#footnote-319) According to article 12-13 of the Squeeze-out Decree, the bidder has to file a prospectus with the financial supervisor (the Financial Services and Markets Authority - FSMA), which should include a justification of the price and the valuation methods (nrs. 4.1.4 and 4.1.5. of the prospectus scheme attached to the Squeeze-out Decree). This prospectus is accompanied by a report of an independent expert (appointed by the bidder), which should include *inter alia* a valuation of the securities (including the valuation methods) and an opinion on the price offered by the bidder (article 6 Squeeze-out Decree). This means that the price offered by the bidder can also deviate from the valuation by the expert.[[320]](#footnote-320)

The FSMA must approve the prospectus and can recommend the bidder to take measures that protect the minority shareholders (articles 10-11 Squeeze-out Decree). However, the FSMA cannot oblige the bidder to offer a higher price: in that case the bidder may retract its offer.[[321]](#footnote-321) If the prospectus is approved by the FSMA, the board of directors of the target company must draft a “memorandum of response”, which includes an opinion on the report of the independent expert and on the price (articles 15-16 Squeeze-out Decree). Of course, the question arises how useful this memorandum is, since the board is controlled by the controlling shareholder and since there is already a report by an independent expert.[[322]](#footnote-322) In addition, the procedure of article 523 of the Belgian Companies Code does not apply for the decision on the memorandum of response,[[323]](#footnote-323) according to the reasoning of the Court of Appeals in Brussels in the *Tractebel* case.[[324]](#footnote-324) Indeed, the decision of the board of directors is not a formal decision in the sense of article 523 of the Belgian Companies Code, but merely a recommendation to the shareholders. From the inapplicability of article 523 follows (*inter alia*) that the directors that represent the majority shareholder do not need to abstain and can also vote on the contents of the report.[[325]](#footnote-325)

Finally, minority shareholders that are not satisfied with the price can file a claim with the Court of Appeals in Brussels (article 121 of the Law on Financial Supervision[[326]](#footnote-326)), but it is rather unlikely that the court will alter the price.[[327]](#footnote-327)

1. **Post-takeover squeeze-out.** After a takeover bid, the bidder must reopen the bid if he has acquired more than 90% of the shares (article 35 Takeover Decree[[328]](#footnote-328)). In addition, the bidder can proceed with a post-takeover squeeze-out if the threshold for this is reached (see articles 42 and 43 of the Takeover Decree). The post-takeover squeeze-out must be executed by reopening the bid within three months after the expiration of the acceptance period. The shares that have not been tendered after this are automatically transferred to the bidder. This constitutes a more simplified way of removing minority shareholders than the stand-alone squeeze-out, as no additional prospectus or reports are necessary. The intention to perform a post-takever squeeze-out should be announced in the prospectus of the takeover bid (nr. 4.1.7 of Annex I to the Takeover Decree).

According to article 42 of the Takeover Decree, there is a double threshold for a post-takeover squeeze-out: (1) the bidder must own 95% of the capital carrying voting rights and 95% of securities carrying voting rights (the so-called “single threshold”); and (2) at least 90% of the shares included in the bid must have been tendered (the so-called “acceptance rate threshold”). There is an exception to this rule for squeeze-outs after mandatory bids, in which case only the first condition needs to be fulfilled (article 57 Takeover Decree). This double threshold has been criticized in the literature, as it (wrongfully) applies the two thresholds cumulatively, while the Takeover Directive stipulated that these thresholds could only apply alternatively.[[329]](#footnote-329) This makes it harder for shareholders who already have a majority stake in the target company to perform a squeeze-out.[[330]](#footnote-330)

The consideration in a post-takeover squeeze-out must be the same as under the preceding takeover bid (article 43). The presumption of a fair price in case of a mandatory bid or a voluntary bid with an acceptance rate of at least 90%, which is prescribed in the Takeover Directive, is not explicitly repeated in the Takeover Decree.[[331]](#footnote-331) However, this follows from the structure of post-takeover squeeze-outs in Belgium: the bid price is always presumed to be fair for a post-takeover squeeze-out, because the 90% acceptance rate threshold is a condition for a post-takeover squeeze-out to be possible.[[332]](#footnote-332) The fact that there is no additional report by an independent expert on the price is perhaps the biggest advantage of the post-takeover squeeze-out as compared to the stand-alone squeeze-out.[[333]](#footnote-333) However, a report by an independent expert is required in the preceding takeover bid in case of a takeover bid by a controlling shareholder (see the next paragraph).

1. **Takeover bid by controlling shareholder.** For the present master thesis, article 20 to 23 of the Takeover Decree are also very interesting.[[334]](#footnote-334) These articles concern the special rules in case of a takeover bid by a controlling shareholder. Control in this case is defined as in article 5 of the Belgian Companies Code. In such a case, the independent directors of the board of the target company have to appoint one or more independent experts (articles 21-22 Takeover Decree). These independent experts will prepare a report on the valuation of the securities included in the takeover bid, including the valuation methods and the relevant facts (article 23 Takeover Decree). This is an obligation that is not required in a takeover bid by an independent party. In contrast with the report of the independent export in the stand-alone squeeze-out, the expert does not have to express an opinion on the fairness of the price.[[335]](#footnote-335)
2. **Rationale behind rules on takeover bid by controlling shareholder.** The relevance of this provision to “two-step going private freeze-outs” makes it highly interesting for the current master thesis. As the Belgian regulation provides for more protection in determining the price in the preceding takeover bid, this protection automatically also has an impact on the price in the subsequent post-takeover squeeze-out, which is necessarily the same price (see above in paragraph 135).

What is interesting is that the Belgian legislator recognizes with this provision that tender offers by a controlling shareholder, and hence also two-step going private freeze-outs, provide an additional risk for minority shareholders as compared to tender offers by independent bidders. This is a similar reasoning to the one made by Brudney & Chirelstein, who argued for a stricter regime for freeze-outs after tender offers by controlling shareholders than by independent bidders.[[336]](#footnote-336) The Belgian legislator reasoned in a similar way, but for the first step of these two-step transactions: it provided for more protection in the preceding takeover bid.

The reason behind this stronger protection is that a fair price is not guaranteed by market forces in case of a takeover bid by a controlling shareholder, as the chance of a successful counter-offer is very small.[[337]](#footnote-337) In addition, the board of directors can hardly be relied upon to protect the interests of the minority shareholders, as it is controlled by the controlling shareholders.[[338]](#footnote-338) This is especially true because the procedure of article 523 of the Belgian Companies Code does not apply to the board of directors in the context of takeover bids,[[339]](#footnote-339) according to the reasoning of the Court of Appeals of Brussels in the *Tractebel* case (see above in paragraph 134 for squeeze-outs).[[340]](#footnote-340) From the inapplicability of article 523 follows that the directors that represent the controlling shareholder in the board of directors can also vote on the decision whether to recommend the takeover bid. This is in contrast with a board of independent directors, which could bargain with the controlling shareholder to raise the price in exchange for a positive recommendation of the bid.

Another reason why a takeover bid by a controlling shareholders is more dangerous to the minority shareholders is that the bidder can wait until a moment when the market price of the shares is low to launch the bid. Finally, there is always an implicit threat that the liquidity from the shares will be low after the bid and that the controlling shareholder will change the policy of the company, for example regarding dividend distribution.[[341]](#footnote-341) All these factors induce the minority shareholder to accept even an insufficient takeover bid, which justifies additional protection by the legislation.

### Sell-out right

1. **Sell-out.** Another innovation that was introduced by the Takeover Directive and that is actually the opposite of the squeeze-out right is the sell-out right. Basically, article 16 of the Takeover Directive gives minority shareholders the right to force the bidder to buy their shares at a fair price (determined in the same way as for squeeze-outs), under the same conditions as the squeeze-out right.
2. **The Netherlands.** In the Netherlands, minority shareholders have a sell-out right until up to three months after the end of the acceptance period of the bid if the bidder has acquired more than 95% of the issued capital and more than 95% of the voting rights (article 2:359d Dutch Civil Code).
3. **Belgium.** Under Belgian law, minority shareholders have a sell-out right for three months after the end of the bid if (1) the bidder has acquired more than 95% of the capital carrying voting rights and 95% of securities carrying voting rights; and (2) at least 90% of the shares included in the bid must have been tendered (article 44 Takeover Decree). For mandatory bids, only the first condition needs to be fulfilled (article 57 Takeover Decree).

### Conclusion

1. **No harmonisation.** From the paragraphs above, it has become clear that despite the fact that squeeze-outs are covered by the Takeover Directive, the rules on squeeze-outs are not completely harmonized at the moment, especially concerning the threshold and the method of determining the squeeze-out price. A majority of stakeholders, however, agrees that the rules are clear, often used, that they work in practice and that the thresholds are appropriate.[[342]](#footnote-342)
2. **High threshold.** Nevertheless, it is still true that Europe opts for a very high threshold for squeeze-outs at around 90-95%, especially in comparison with the 50% threshold for freeze-out mergers in the United States. A possible explanation for this difference in threshold is the belief in Europe that too low a threshold for freeze-outs would constitute a breach of the property rights of minority shareholders, which are protected by article 1 FP ECHR.[[343]](#footnote-343) For this reason, we will study the relationship between freeze-outs and the right to property more in depth in the next part.

## Freeze-outs under the European Convention of Human Rights

1. **Squeeze-outs and the right to property.** In essence, the legislation on squeeze-outs is an authorisation given by the state to a private person (the controlling shareholder) to take away the private property (the shares) of another private person (the minority shareholders). This raises the question whether this is compatible with the right to property under article 1 of the First Protocol to the European Convention of Human Rights (FP ECHR).[[344]](#footnote-344)

This article reads as follows: *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*

1. **The three rules of *Sporrong*.** In *Marckx v. Belgium[[345]](#footnote-345)*, the European Court of Human Rights clarified that by referring to the “peaceful enjoyment of possessions”, article 1 FP ECHR is effectively guaranteeing the “right to property”. Later, in the *Sporrong and Lönnroth v. Sweden[[346]](#footnote-346)* case, the court distinguished three rules in article 1 FP ECHR. The first sentence of the first paragraph of article 1 FP ECHR contains a general rule on the peaceful enjoyment of property rights (*lex generalis*). This general rule is then concretized into two specific rules (*leges* *speciales*): the second sentence of the first paragraph of article 1 governs “deprivations of property”, *i.e.* formal or de facto expropriations, while the second paragraph of article 1 FP ECHR governs interferences by the state that “control the use of property”. The court should first check whether one of the two specific rules applies, and if not, it should apply the general rule of the first sentence. However, the three rules should not be regarded as being completely distinct.[[347]](#footnote-347) Instead, the two specific rules should be regarded as specifications of the general rule.
2. **Qualification of squeeze-outs as an expropriation?** The court uses a broad conception of “property”. [[348]](#footnote-348) In *Bramelid and Malmström v. Sweden[[349]](#footnote-349)*, it ruled that shares are protected as property under article 1 FP ECHR, as they have an economic value.Of course, then the question arises under which of these three rules we should analyse squeeze-out provisions.

The Winter Report that preceded the Takeover Directive, as well as some authors, view squeeze-outs as a form of expropriation that falls under the second sentence of article 1, paragraph 1 FP ECHR.[[350]](#footnote-350) This entails that the rules on squeeze-outs must be (1) provided by law (which is no problem for freeze-outs), (2) in the public interest, and (3) proportionate to this public interest.[[351]](#footnote-351) From the final condition of proportionality follows that the minority shareholders should receive a fair compensation for their shares.[[352]](#footnote-352) Since most countries do have elaborate rules to establish the fair value of the shares, this is not an insurmountable hurdle for a freeze-out regime either.

1. **The public interest requirement.** However, the public interest requirement might cause a problem, since squeeze-outs serve (at least at first sight) primarily the private interests of the controlling shareholder. Nevertheless, in *James and others v. the United Kingdom*[[353]](#footnote-353), the court has opted for a broad interpretation of the public interest, which can also include the interest of another private person.[[354]](#footnote-354) Indeed, it ruled that *“a taking of property effected in pursuance of legitimate social, economic or other policies may be ‘in the public interest’, even if the community at large has no direct use or enjoyment of the property taken.”[[355]](#footnote-355)* Van der Elst and Van den Steen have argued that the public interest condition is fulfilled for squeeze-outs: it serves the interest of the company, because through the squeeze-out it can perform a delisting, which allows it to avoid costs and be more efficiently run.[[356]](#footnote-356) They also refer to the economic rationale for squeeze-outs, especially in facilitating efficient takeovers by remedying the free rider problem (see further in paragraph 232).

Nevertheless, these authors concede that a squeeze-out can only be justified “in exceptional circumstances” and when “the minority is fairly small”.[[357]](#footnote-357) Consequently, a high threshold for squeeze-outs is regarded as necessary to comply with the right to property in article 1 FP ECHR, even if this might conflict with economic efficiency.[[358]](#footnote-358)

1. **Krohn: squeeze-outs are no expropriation.** In contrast to this view, Krohn has argued on the basis of the case law of the European Court of Human Rights that a squeeze-out does not qualify as an expropriation in the sense of article 1, first paragraph, second sentence FP ECHR.[[359]](#footnote-359) Hence, it should not be subject to the strict requirements of public interest and fair compensation. Nevertheless, it would still fall under the general rule of article 1, first paragraph, first sentence FP ECHR.
2. ***Bramelid.*** This reasoning is based on the decision in *Bramelid[[360]](#footnote-360)* of the European Commission of Human Rights concerning admissibility. In this decision, the commission ruled that a squeeze-out is not an expropriation, but *“concerns principally relationships between shareholders”* and *“has nothing to do with the notion of public interest”*.[[361]](#footnote-361) Therefore, the second sentence of article 1, first paragraph FP ECHR does not apply to squeeze-outs.

The commission did analyse the squeeze-outs under the general rule of the first sentence, but came to the conclusion that there was no infringement in this case. It ruled that the Swedish legislation on squeeze-outs must be considered as *“legislation governing private law relations between individuals”*.[[362]](#footnote-362) This legislation is allowed, provided that it *“does not create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another”*[[363]](#footnote-363), which was not the case. This test of “not arbitrarily or unjustly deprived of property” is less stringent than the justification of “public interest” and the requirement “fair compensation” under the second sentence.[[364]](#footnote-364)

1. ***Kind* and *Freitag*.** *Bramelid* was 16 years later confirmed by an admissibility decision of the European Court of Human Rights in *Kind v. Germany[[365]](#footnote-365)* in 1998. *Kind* concerned a conversion of a company into another company form, which had as a consequence that the minority shareholders were frozen out (with compensation). In a reasoning and formulation that is very similar to *Bramelid*, the court again came to the conclusion that the second sentence of article 1, first paragraph FP ECHR does not apply, because this is not an expropriation.[[366]](#footnote-366) In addition, the court ruled again that there was no violation of the general rule in the first sentence either, as the shareholders were not arbitrarily and unjustly deprived of their property. The reasoning of *Bramelid* and *Kind* was later confirmed in *Freitag[[367]](#footnote-367)*.
2. ***James*.** However, other case law of the court has analysed squeeze-outs and comparable techniques as an expropriation that falls under the second sentence of article 1, first paragraph FP ECHR. This view could already be found in 1986, in *James and others v. the United Kingdom[[368]](#footnote-368)*. Although this case was not about squeeze-outs, it concerned a similar situation: it was about holders of long-term leases on houses in the United Kingdom, who were given a right to compulsory buy the property rights of the property they were leasing under the Leasehold Reform Act. In essence, like with squeeze-outs, this is about a compulsory transfer of property from one private party to another.

What is interesting in this case is that the court analysed this case as an expropriation under the second sentence of article 1, first paragraph FP ECHR.[[369]](#footnote-369) Indeed, the court considered that *“a system of law governing the contractual or property rights of private parties is a matter of public concern”[[370]](#footnote-370)*, so that it should be analysed as an expropriation.[[371]](#footnote-371) However, the court found no violation of the right to property. Above, we already discussed how *James* interpreted the concept of public interest in a broad way so that it also includes transfer to another private party if there is a legitimate policy reason for this. In addition, the court granted a margin of appreciation to national courts in determining the public interest.[[372]](#footnote-372) Therefore, the court found no violation of the second sentence of article 1, first paragraph FP ECHR, and concluded that an analysis under the first sentence could not lead to a different result.

1. **Krohn: reconciling *Bramelid* and *James*?** Nevertheless, Krohn does not believe that it follows from *James* that squeeze-outs should also be analysed as an expropriation, and he tries to reconcile *Bramelid* and *James*.[[373]](#footnote-373) First, he argues that in *James* the state intervened to favour a certain group of persons, the tenants, while in a squeeze-out such as in *Bramelid*, the property transfer in favour of a certain group of persons is not the objective of the law, as the law affects all investors generally.[[374]](#footnote-374) However, this reasoning is criticizable. Squeeze-outs in fact favour controlling shareholders, and this amounts to a certain bias, because the general investing public is less likely to be a controlling shareholder than an individual entrepreneur is.[[375]](#footnote-375) In addition, Krohn also argues that unlike the expropriation in the *James* case, a squeeze-out such as in *Bramelid* is based on a voluntary agreement, because the parties were aware of this possibility when buying the shares.[[376]](#footnote-376) Finally, the difference with the case on squeeze-outs is that minority shareholders do not control the assets of the company and have to accept that these assets can change. Therefore, they do not have the same “legitimate expectation” that the nature of their investment will remain unaltered.[[377]](#footnote-377)
2. ***Offerhaus*.** In a case from 1977 on the Dutch rules on squeeze-outs, *Offerhaus[[378]](#footnote-378),* the plaintiffs complained that the squeeze-out amounted to a deprivation and was not in the public interest and without fair compensation. The court proceeded to analyse the case under the second sentence as an expropriation, Nevertheless, it also came to the conclusion that the squeeze-out rules did not violate the right to property in article 1 FP ECHR.

This case seems even more difficult to reconcile with *Bramelid*, as it analyses squeeze-outs under the second sentence instead of the first sentence, without giving any reasons why and without even citing *Bramelid*. Because it has not been cited in later decisions, was poorly motivated and only concerned a decision about the admissibility of the case, the importance of *Offerhaus* should not be overstated, however.

1. **Conclusion**. In conclusion, the compatibility of squeeze-outs with the right of property in article 1 FP ECHR has often been questioned before the court, but the European Court of Human Rights has never found a violation of the right to property. The case law of the court is unclear on whether this compatibility should be analysed under the specific rule on expropriations (article 1, first paragraph, second sentence FP ECHR), as in *James* and *Offerhaus*, or under the general rule on the peaceful enjoyment of property rights (article 1, first paragraph, first sentence FP ECHR), as in *Bramelid* and *Kind*. The latter case law is better reasoned by the court, arguing that squeeze-outs concern a purely private relationship. This is also the view defended by Krohn.[[379]](#footnote-379)

Regardless of whether freeze-outs should be analysed under the first or second sentence of article 1, first paragraph FP ECHR, the result is the same, as the European Court of Human Rights has always upheld freeze-outs. In our opinion, this is the correct result, because the public interest requirement and the requirement of fair compensation can be fulfilled. Indeed, existing statutory law in Europe contains detailed rules on how fair compensation should be determined. Also, freeze-outs fulfil a function in the public interest: not only do they allow effecting a delisting to eliminate the nuisance value of minority shareholders and allow the company to be run more efficiently, they also ensure an efficient market for corporate control by addressing the free rider problem and the holdout problem (see further in paragraph 232 and 242).

In either case, the European Court of Human Rights seems to be less strict for freeze-outs than the Winter Report assumes.[[380]](#footnote-380) The court never stated that the threshold is a relevant indicator of whether the property rights of minority shareholders are violated. Therefore, one could argue that a lower threshold for freeze-outs should still be compatible with the right to property. Indeed, if the legislator sets the threshold too high for freeze-outs, this might lead to economic inefficiencies in the market for corporate control (see further in paragraph 245). For this reason, it would be advisable to view squeeze-outs as justified in the public interest, even at a lower threshold than is currently the case. In our opinion, the court should consider granting member states a wide margin of appreciation in this field.

In the *Versatel* case[[381]](#footnote-381) (see further in paragraph 177), the Dutch Supreme Court considers that the use of a merger to freeze out minority shareholders is not a violation of the right to property in article 1 FP ECHR, even though the threshold for mergers is only a two thirds majority, as compared to 95% for squeeze-outs. This decision seems to indicate that the Dutch courts agree that freeze-outs at a lower threshold are not necessarily a violation of the right to property.

## Conclusion

1. **Overview.** In this part, we make some concluding remarks on the law on freeze-outs in Europe. We will note already some points of difference with the United States, but a thorough comparison will be done later in chapter 7, after we have discussed the use of mergers as a freeze-out technique under Dutch and Belgian law.
2. **No complete harmonization.** A first remark is that while European law on freeze-outs is to some extent harmonized by the Merger Directive, the Takeover Directive, and by the common legal culture, this harmonisation is incomplete. Some differences remain, especially concerning the exact threshold (even though it is always very high, around 90-95%) and the precise determination of a fair squeeze-out price. This complicates the study of freeze-outs in Europe. As Van der Elst and Van den Steen have remarked: *“the devil is in the details”*.[[382]](#footnote-382)
3. **Different approach: rules vs. standards; external vs. internal actors.** Although we will study this aspect in more detail in chapter 7, we already want to hint at the different approach in Europe as compared to the United States. In Europe, freeze-outs are (mainly) governed by detailed legal rules in statutory law, while the United States rely more on protection of minority shareholders through general standards that are applied by case law.[[383]](#footnote-383) In addition, European law on squeeze-outs protects minority shareholders through external “gatekeepers”, such as courts, the financial supervisor or independent experts, while the United States use internal actors for this, like a special committee of independent directors or a majority of the minority shareholders.
4. **High threshold in Europe.** Another difference is that the threshold for squeeze-outs is considerably higher in Europe (90-95%) than the threshold in the United States for freeze-out mergers (50%). A possible explanation for this is the emphasis on property rights in Europe, as discussed above. However, we concluded above from the case law of the European Court of Human Rights that there should be no legal hurdle under the right to property in article 1 FP ECHR to lower the threshold for squeeze-outs.
5. **Avoiding the high threshold.** The high threshold for squeeze-outs can be a nuisance for controlling shareholders that want to take a company private. Indeed, bidders not always succeed in acquiring enough shares through a takeover bid, and a minority of 5% or 10% suffices to block a going private operation. In addition, the mere presence of the high threshold, even if it is often reached in practice, may elevate the freeze-out price to inefficiently high levels (see further in paragraph 245).

For this reason, transaction planners have looked for ways to avoid this high threshold. This evolution has been most visible in the Netherlands, where there is a growing body of case law on alternative freeze-out techniques that can be used to freeze out minority shareholders at a lower threshold. In the next chapter, we will discuss this evolution. Afterwards, we will see whether the same evolution is happening or could possibly happen in Belgium.

# Alternative freeze-out techniques in the Netherlands

## Introduction

1. **Alternative freeze-out techniques.** As discussed in the previous chapter (part 4.4.2), the Netherlands traditionally knows two freeze-out techniques, the stand-alone squeeze-out (article 2:92a Dutch Civil Code) and the post-takeover squeeze-out (article 2:359c Dutch Civil Code). Both require that the majority shareholder owns at least 95% of the outstanding shares, as is customary in many European countries.[[384]](#footnote-384)However, there are also alternative freeze-out techniques based on general corporate law that can be used if the 95% threshold is not reached. [[385]](#footnote-385)

The three main alternative freeze-out techniques are the merger, the “de facto merger” and the “dispute division” (*“ruziesplitsing”*).[[386]](#footnote-386) In chapter 2, we already introduced the first two of these techniques in general, with examples and figures. In this chapter, their validity under Dutch law will be examined.

1. **Merger as a freeze-out technique.** The most popular alternative freeze-out technique is the stock merger. With this technique, a majority shareholder or its subsidiary can acquire the target company through a merger, causing the minority shareholders of the target company to become shareholders in the company-majority shareholder. Under Dutch law, it is also possible that the minority shareholders become a shareholder in a group company (the so-called *“driehoeksfusie”* (“triangular merger”) – article 2:333a Dutch Civil Code), which is often used as an alternative freeze-out technique. Under Dutch law, mergers must be approved by two thirds of the shareholders at the shareholders’ meeting (article 2:43 *iuncto* articles 2:317 and 2:330 Dutch Civil Code).

In contrast with Delaware law, a cash merger is not allowed under Dutch law (article 2:325 Dutch Civil Code). Nevertheless, a stock merger still has the advantage that it simplifies the structure and puts an end to the costs of a separate listing for the target company and of organizing separate general assemblies (see above in paragraph 45).[[387]](#footnote-387) In addition, the transaction can be structured in such a way that the merger dilutes the minority shareholders below 5%, so that they can be squeezed out (see the example above in paragraph 46).[[388]](#footnote-388)

1. **De facto merger as a freeze-out technique.** A second alternative freeze-out technique is the “de facto merger”.[[389]](#footnote-389) Under this technique, the majority shareholder of the target company sells all of the target company’s assets (and possibly the liabilities) to himself. After this, the target company only owns the cash that was paid as consideration and can then enter into a liquidation to cash out the minority shareholders. Both steps must be approved by the shareholders’ meeting of the target company with an ordinary majority (article 2:107a and article 2:19 Dutch Civil Code), except if the articles of association require a supermajority.[[390]](#footnote-390)
2. ***“Ruziesplitsing”* as a freeze-out technique.** Finally, another possible freeze-out technique is the Dutch *“ruziesplitsing”* (literally a “dispute division”).[[391]](#footnote-391) Under this technique, the assets and liabilities of the target company are divided and transferred to another company. The shareholders are split over the companies too. The reason why this technique is called a “dispute division”, is that it allows shareholders who have a conflict to divide the company between themselves so that they can continue their separate ways. However, a conflict between the shareholders is not a formal requirement for the dispute division.

As a freeze-out technique, the dispute division is usually structured in such a way that the majority shareholder becomes shareholder in a company that owns most of the target’s business, while the minority shareholders become shareholders in a company that owns other assets or cash with a value that is equivalent to the previous value of their shares. According to article 2:334cc of the Dutch Civil Code, this transaction must be approved by a majority of 75% of the votes in a shareholders’ meeting where 95% of the legal capital is represented.

1. **Fair compensation.** For all three alternative freeze-out techniques, the most important issue is identical: what is a fair compensation for the shares of the minority shareholders? Because the basic issue is the same, and because a merger is used most often as a freeze-out technique[[392]](#footnote-392), the rest of this chapter will focus on mergers. Nevertheless, the principles discussed below are applicable per analogy to the other alternative freeze-out techniques.
2. **Procedural protections for minority shareholders.** When a merger is used as an alternative freeze-out technique, minority shareholders are protected by the rules and procedures for mergers in general.[[393]](#footnote-393) For example, the management board[[394]](#footnote-394) must draw up a merger proposal, subject to approval by the supervisory board (article 2:312 – 2:313 Dutch Civil Code). This proposal must contain the exchange ratio of the shares and a justification of this ratio based on a valuation of the companies (article 2:326 – 2:327 Dutch Civil Code). In addition, an accountant must draw up a statement with an opinion on the reasonableness of the exchange ratio (article 2:328 Dutch Civil Code). Unlike for stand-alone squeeze-outs, however, there is no price determination by the court.[[395]](#footnote-395)

For the dispute division, similar rules apply (see article 334a and following Dutch Civil Code). While a de facto merger does not enjoy any special statutory protections for minority shareholders, the rules for mergers should be applied per analogy to satisfy the test of reasonableness and fairness.[[396]](#footnote-396)

1. **Remedies – “reasonableness and fairness”.** The alternative freeze-out techniques discussed above are corporate reorganizations available under general company law that can also be used to freeze out minority shareholders. Other than is the case for the squeeze-out provisions, however, this is not their main purpose.[[397]](#footnote-397) This had led minority shareholders in the Netherlands to file claims against such transactions. A first way of challenging these transactions is to claim annulment of the merger decision of the shareholders’ meeting, alleging that it violates the principle of “reasonableness and fairness” (article 2:323 *iuncto* article 2:15 and article 2:8 Dutch Civil Code).
2. **Remedies – “*enquêteprocedure*”.** Alternatively, minority shareholders can also challenge alternative freeze-out techniques with the *enquêteprocedure* (investigation procedure).[[398]](#footnote-398) If they can prove that there are legitimate reasons to doubt the proper management (*“gegronde redenen om aan een juist beleid te twijfelen”*), the Commercial Chamber of the Court of Amsterdam (hereinafter the “Commercial Chamber”) can order an investigation into the affairs of the company (article 2:350 Dutch Civil Code). If the Commercial Chamber finds that there is mismanagement of the company (*“wanbeleid”*), it can order one of the far-reaching measures of article 2:356 of the Dutch Civil Code, such as the annulment of decisions or firing or appointing one or more directors (article 2:355 Dutch Civil Code). This means that the Commercial Chamber cannot only intervene *ex post*, but also *ex ante* through “injunctive relief”.[[399]](#footnote-399) The *enquêteprocedure* is the most flexible way of challenging freeze-out mergers, especially since the Commercial Chamber can order all sorts of immediate measures at any time during the proceedings (article 2: 349a Dutch Civil Code).

What is interesting, however, is that in this kind of proceedings, the Commercial Chamber also bases itself on the open norm of “reasonableness and fairness” in article 2:8 of the Dutch Civil Code.[[400]](#footnote-400) It even incorporates rules from non-binding corporate governance codes into this open norm (see further in paragraph 178).

1. **Overview.** Minority shareholders have used these remedies to challenge alternative freeze-out techniques. The result is a large body of literature and some notable cases on the validity of this kind of freeze-out techniques.

## The *Leyinvest* case

1. **Facts.** One of the first cases on the validity of alternative freeze-out techniques was the *Leyinvest* case.[[401]](#footnote-401) In this case, Vendex NV launched a friendly takeover bid on NV Koninklijke Bijenkorf Beheer (“KBB”), acquiring almost 93% of the shares. In the offer documents, Vendex had announced that it would squeeze-out the minority shareholders, or if the 95% threshold was not reached, engage in a merger between Vendex and KBB. The underlying goal was to remove the minority shareholders in order to reach a full legal and financial integration of both companies. Since the 95% threshold was not reached, Vendex and KBB prepared a merger proposal.

Leyinvest, a subsidiary of Blokker, a competitor of KBB, owned 6,8% of the shares in KBB, enough to block a post-bid squeeze-out. It rejected the bid and filed for summary proceedings, requesting the president of the tribunal of Amsterdam to order Vendex and KBB to retract the merger proposal.

1. **Summary proceedings.** The president of the tribunal denied this request, however. First, it ruled that the wish of the majority shareholder to avoid the permanent burden of minority shareholders is a legitimate one.[[402]](#footnote-402) In addition, the use of a merger to freeze out remaining minority shareholder was already announced in the offer documents.[[403]](#footnote-403) Second, Leyinvest had also questioned the independence of KPMG, the accountant that certified the exchange ratio of the merger proposal, because it was appointed by both Vendex and KBB. Nevertheless, the president of the tribunal rejected this argument too, ruling that this fact alone was not sufficient to doubt the independence of the accountant.[[404]](#footnote-404) Finally, Leyinvest argued that the exchange ratio was unfair. However, the president of the tribunal did not accept this argument, as the shares were valued at the same price as in the preceding takeover bid, which was accepted by a large majority.[[405]](#footnote-405) Hence, this request was also rejected.
2. **Tribunal of Amsterdam.** However, in the procedure on the merits, the tribunal of Amsterdam ruled that the merger did in fact violate the principle of reasonableness and fairness of article 2:8 of the Dutch Civil Code.[[406]](#footnote-406) It ruled that Vendex as a majority shareholder of KBB should have taken into account the interests of Leyinvest, the minority shareholder, especially in determining the exchange ratio. Concretely, Vendex should have asked an independent accountant to evaluate the exchange ratio of the merger, and not only KPMG, and should have provided this accountant with the internal company information that Vendex had in its possession as a majority shareholder of KBB. As this was not the case, the tribunal ruled that the merged entity “Vendex KBB” had to indemnify Leyinvest for its losses. An expert was appointed to determine the precise amount of this indemnification.
3. **Conclusion.** In conclusion, the *Leyinvest* case shows that the use of a merger as an alternative freeze-out technique can be valid or not, depending on the circumstances. The relevant criterion here is the principle of “reasonableness and fairness” of article 2:8 of the Dutch Civil Code. The independence of the accountant is an important issue in this regard. We would have to wait until the *Versatel* case law, however, before the precise conditions for this general principle would be further concretized.

## The *Versatel* case

1. **Introduction of the *Versatel* case law.** The most important case on the validity of alternative freeze-out techniques is the *Versatel* case. The case gave rise to a number of interesting decisions by the Commercial Chamber[[407]](#footnote-407) and the Supreme Court[[408]](#footnote-408) on various issues relating to freeze-outs. *Versatel I* concerned the validity of alternative freeze-out techniques under the principle of reasonableness and fairness, while *Versatel II* and *Versatel III* concerned issues of corporate governance in the context of a freeze-out, such as the applicability of the corporate governance code and the appointment of independent directors.[[409]](#footnote-409)
2. ***Versatel* - facts.**The facts of the case were as follows. Versatel was a company listed on Euronext Amsterdam, controlled by a company named Talpa. Tele2 Finance, a subsidiary of Tele2 AB and an independent bidder, launched a takeover bid on the shares of Versatel. In the offer document, Tele2 stated that its goal was to delist Versatel and freeze out all the minority shareholders by using all legal measures available. It announced that if the threshold of 95% for a squeeze-out would not be reached, it would pursue other transactions to freeze out the minority shareholders. Most importantly, Versatel would enter into a triangular merger with a company from the Tele2 group. The minority shareholders would receive “tracking stock” in Tele2 Holding. With these shares, the Versatel minority shareholders would only receive the profits attributable to the activities of Versatel, while the other shareholders of Tele2 Holding would only receive profits attributable to other divisions of the company. This would mean essentially that the profit rights of the Versatel minority shareholders would remain the same. In addition, the minority shareholders would receive an option to sell their shares to Tele2 at a pre-determined price. If the triangular merger would dilute the minority shareholders below the 5% threshold, a squeeze-out would be launched.

The bid was deemed to be reasonable and fair by the management board (*raad van bestuur*) and by the supervisory board (*raad van commissarissen*) of Versatel. Tele2 acquired around 83% of the shares, which is not enough to launch a squeeze-out. Some of the minority shareholders, such as the hedge fund Centaurus, rejected the bid because they considered the price too low. They filed a request for an investigation procedure (*enquêteprocedure*) and for immediate measures with the Commercial Chamber of the Court of Amsterdam to prohibit the post-bid freeze-out techniques that were announced in the offer documents.

1. ***Commercial Chamber Versatel I* – principle of reasonableness and fairness.** In a decision of 27 September 2005, the Commercial Chamber ruled for the first time on the demand for immediate measures.[[410]](#footnote-410) The minority shareholders had argued that a freeze-out below the threshold of 95%, for example through a triangular merger such as contemplated in the offer document, would violate the rules regarding mergers (article 2:309 and following Dutch Civil Code) and squeeze-outs (article 2:92a Dutch Civil Code), as well as the principle of reasonableness and fairness (article 2:8 Dutch Civil Code).

However, the Commercial Chamber ruled that there was no violation. First, it reasoned that there was no evasion of the rules on squeeze-outs, because the purpose of the squeeze-out was to provide the majority with a way to freeze out the minority shareholders.[[411]](#footnote-411) Hence, the squeeze-out procedure was introduced to the benefit of the majority shareholder, and is not intended to preclude other freeze-out techniques. Second, the Commercial Chamber considered that the desire of the majority shareholder to remove the burden of the minority shareholders at the level of the operational company is a legitimate one.[[412]](#footnote-412) The minority shareholders would also remain shareholder, even though in another company. Through the technique of the “tracking stock”, they even retained their profit rights (see the paragraph above). Third, the Commercial Chamber also accepted that Tele2 had tax reasons for the triangular merger, and considered these legitimate as well.[[413]](#footnote-413) Finally, the Commercial Chamber looked favourably upon the transparency of Tele2 through its announcement of the possible post-bid freeze-out techniques in the offer document.[[414]](#footnote-414)

These considerations led the Commercial Chamber to rule that the proposed triangular merger would not violate the purpose of the merger rules, provided that a reasonable exchange ratio was agreed. Hence, it denied the request to take any immediate measures to prohibit the proposed merger. The request for an investigation procedure was postponed until a later date.

1. ***Supreme Court Versatel I* – principle of reasonableness and fairness.** In a decision of 14 September 2007, the Supreme Court confirmed the decision of the Commercial Chamber.[[415]](#footnote-415) The Supreme Court ruled that the law does not support the idea that a merger can never be used to dilute the minority shareholders below the threshold for squeeze-outs.[[416]](#footnote-416) Minority should take into account this possibility of dilution when buying a minority stake in a company.[[417]](#footnote-417) Hence, such a transaction does not necessarily qualify as evasion of the law.[[418]](#footnote-418)

Nevertheless, the Supreme Court also ruled that a merger that only serves to push out minority shareholders can be contrary to the principle of reasonableness and fairness in article 2:8 of the Dutch Civil Code, depending on the circumstances.[[419]](#footnote-419) It is up to the court in a concrete case to balance the interests of the majority and the minority.[[420]](#footnote-420) In casu, the Supreme Court agreed with the Commercial Chamber that the triangular merger was also justified because of tax reasons, and hence did not violate the principle of reasonableness and fairness.

1. **Critique on *Versatel I*.** Raaijmakers has criticized the decision of the Supreme Court in *Versatel I*, however, because it creates uncertainty by leaving the merger open for annulment.[[421]](#footnote-421) He has argued that the actual debate should be on the fairness of the compensation. Raaijmakers as well as other authors have suggested that the American approach that relies on the appraisal remedy is better suited: the minority shareholders receive a right of compensation equal to the fair value of their shares, but no right to block the freeze-out (as is still possible today).[[422]](#footnote-422)

The Supreme Court in *Versatel I* also seems to attach a large importance to the purpose of the freeze-out merger. It states that if the only purpose of a merger is to freeze out the minority shareholders, this would violate the principle of reasonableness and fairness. Hence, the court demands other purposes than freezing out minority shareholders. This opinion is also shared by some of the literature.[[423]](#footnote-423) This result looks similar to the “business purpose test” of *Singer* that used to be applicable in Delaware before it was overruled by *Weinberger* (see above in paragraphs 77 and 79). Hence, the critique on *Singer* also applies to *Versatel I*: it is often not clear under these kinds of test which purposes are sufficient to legitimize the transaction. In addition, a business purpose test is often a rather formalistic test that can be easily circumvented by practitioners who “invent” valid purposes and create a paper trail to support these reasons. Hence, it would be better to abolish the reference to a valid purpose in *Versatel I* to reduce uncertainty and to focus on a fair compensation for minority shareholders.

However, the fairness of the freeze-out price is not an easy question. As Rebers and Maatman note, it is difficult for shareholders to contest the valuation by the majority shareholders, and directors will often not have the right incentives to bargain hard with the majority shareholders about the price.[[424]](#footnote-424)

Another group of authors criticizes the Versatel case law for the opposite reason, because they are of the opinion that it is too flexible. For example, Hermans suggests that the use of a triangular merger to remove minority shareholders at the subsidiary level is an abuse of the merger process, and that tax reasons could not justify such a structure either.[[425]](#footnote-425)

1. **Freeze-out triangular mergers and the right to property.** An issue that was also raised before the Supreme Court in the Versatel case was the compatibility of a freeze-out triangular merger at a threshold below 95% with the right to property under article 1 FP ECHR. In his conclusions in the *Versatel* case, Advocate-General Timmermans concluded that there was no violation of the right to property.[[426]](#footnote-426) He referred to the *Bramelid* case[[427]](#footnote-427) of the European Court of Human Rights on squeeze-outs in Sweden and to the case of the Dutch Supreme Court on the *“geschillenregeling”[[428]](#footnote-428)*, both of which found no violation of article 1 FP ECHR.[[429]](#footnote-429) Relying on this case law, Timmermans concluded that legislator had struck a fair balance with the squeeze-out procedure, between on the one hand the general interest (economic efficiency), and on the other hand the interests of minority shareholders.

The Supreme Court agreed with its Advocate-General.[[430]](#footnote-430) It held that neither the squeeze-out procedure nor the use of triangular mergers to dilute minority shareholders below the squeeze-out threshold violate the right to property in article 1 FP ECHR. The justification for this ruling was that mergers serve other purposes too and provide strong statutory protections for the minority shareholders.

1. ***Commercial Chamber Versatel II* – corporate governance.** Another issue that was raised in the *Versatel* case concerned the corporate governance in Versatel and the appointment of directors from Tele2. Versatel had scheduled a shareholders’ meeting for 15 December 2005 in order to replace some of the directors in the management board and the supervisory board with representatives from Tele2. In addition, the corporate governance policy of Versatel would be amended by excluding article III.6.2 of the Dutch Corporate Governance Code (the “Code Tabaksblat”)[[431]](#footnote-431) on the independence of directors for transactions with Tele2. This way, the Tele2 directors would still be able to decide on the merger proposal of the merger of Versatel with Tele2. The reasoning of Tele2 was that since Versatel was now a fully owned subsidiary of Tele2, application of the Code Tabaksblat was no longer necessary. However, the minority shareholders again filed a request for immediate measures with the Commercial Chamber. They demanded a prohibition to vote on the proposed changes. They also asked that two independent directors would be appointed with the competence to exclusively negotiate and conclude the transactions with Tele2.

In a decision of 14 December 2005, one day before the shareholders’ meeting, the Commercial Chamber ruled on these requests.[[432]](#footnote-432) It decided that there were serious doubts about the proper management of Versatel, due to the conflict of interest of the directors.[[433]](#footnote-433) The Commercial Chamber did not follow the argument of Tele2 that the Code Tabaksblat should not apply because Versatel is a group company of Tele2. On the contrary, it reasons that the Code Tabaksblat should apply, as the minority shareholders have interests that are opposite to those of the majority shareholder and the directors of Versatel.[[434]](#footnote-434) Therefore, the Commercial Chamber grants the immediate measures requested by the minority shareholders. It orders that three new independent directors should be appointed to the supervisory board, with the exclusive competence to negotiate and conclude transactions with Tele2, including the proposed freeze-out merger. Later, these directors will be called the “Special Committee”.[[435]](#footnote-435) In addition, it prohibits Versatel to decide on a deviation from the Code Tabaksblat.[[436]](#footnote-436) Hence, it should be noted that the Commercial Chamber has transformed the non-binding best practices of the Code Tabaksblat into binding rules through the principle of reasonableness and fairness and through the immediate measures available in an *enquêteprocedure.*[[437]](#footnote-437)

1. ***Supreme Court Versatel II* – corporate governance.** This ruling was later confirmed by the Supreme Court in *Versatel II (SC)*.[[438]](#footnote-438) In this case*,* the Supreme Court rejected the appeal against both immediate measures taken by the Commercial Chamber. It ruled that the Commercial Chamber can take any immediate measures that it deems necessary, and that it can even deviate from mandatory statutory law when doing so. The only conditions are that these measures must be necessary and temporary, and must be taken on the basis of a fair balance of the interests of the parties. In the case at hand, the Supreme Court stated that the Commercial Chamber could appoint directors with different competences than those stipulated in the law.

The Supreme Court also held that the Commercial Chamber could prohibit Versatel to deviate from the Code Tabaksblat. It considered that the Commercial Chamber rightly feared that Tele2 would insufficiently take into account the principles of the Code Tabaksblat. It countered the argument that the shareholders’ meeting is competent to deviate from the Code Tabaksblat (cfr. the “comply or explain” principle) with the ruling that the Commercial Chamber can intervene in the division of competences provided by the law.

1. ***Supreme Court Versatel III* – corporate governance.** The same decision of the Commercial Chamber was also the subject of a third decision of 14 September 2007 of the Supreme Court, called “*Versatel III”*.[[439]](#footnote-439) This decision concerned the appeal of Tele2 against the refusal of the Commercial Chamber to allow the Tele2 directors to be appointed as directors in the supervisory board of Versatel. Instead, the Commercial Chamber appointed three independent directors. With a similar reasoning as in *Versatel II (SC)*, the Supreme Court rejected the appeal. It considered that the Commercial Chamber had the discretion to balance the interests of the parties and did not act unreasonably in deciding that the appointment of the Tele2 directors constituted a threat to the minority shareholders. The fact that Versatel was a group member of the Tele2 group did not change the conclusion, as there were still minority shareholders present who had to be protected.
2. **Critique on *Versatel II* and *Versatel III*.** The decisions in *Versatel II* and *Versatel III* have also been criticized by Raaijmakers.[[440]](#footnote-440) He argues that the decisions have slowed down and complicated the process, and has put the independent directors in a difficult position, where they might have clashed with the controlling shareholder, Tele2. He thinks that it would be better to focus on a fair price, as is the case under the American appraisal remedy.

On the other hand, a special committee of independent directors, as created by *Versatel II* and as is also common practice in the United States (see above in paragraph 83), can be a powerful tool for protecting minority shareholders. Some Dutch authors have also supported the appointment of independent directors for post-bid situations.[[441]](#footnote-441)

But the Dutch courts, unlike their American counterparts, miss an important point: the *Versatel* case concerned a “post-acquisition freeze-out”, *i.e.* a freeze-out preceded by a takeover bid from an independent bidder. We can therefore assume that the former directors of the target have engaged in an at arm’s length bargaining process on the bid (including on the post-acquisition freeze-out techniques announced in the offer documents) and that the price and conditions of the bid and the post-acquisition freeze-out are fair if they are approved by the board of directors and accepted by a sufficient number of the shareholders[[442]](#footnote-442). Indeed, both the takeover process and the merger process have their own procedural safeguards. Therefore, additional procedural safeguards, such as a special committee of independent directors that negotiate the post-acquisition freeze-out, are unnecessary.[[443]](#footnote-443) In addition, it is not clear how this could lead to a higher price for the minority shareholders, as the bidder is prohibited from acquiring shares at a higher price than the bid price for one year after the bid (article 5:79 Financial Supervision Law[[444]](#footnote-444)).

1. **Result of the *Versatel* case.** After the decision of the Commercial Chamber in *Versatel II*, where the court appointed three independent directors for Versatel, a new merger structure was proposed. Under this structure, the minority shareholders could also subscribe to the shares that would be newly issued in the transaction to prevent dilution of their shareholding.[[445]](#footnote-445) This proposal was also challenged by the minority shareholders, but this time the Commercial Chamber rejected the request.[[446]](#footnote-446) Hence, the minority was forced to accept the deal in the end in the *Versatel* case, even though they were not completely wiped as minority shareholders out if they opted to subscribe to the new shares.
2. **Conclusion.** From the *Versatel* case law, we can conclude that alternative freeze-out techniques, such as a triangular merger, are not *ipso facto* prohibited. However, they can be (but are not always) contrary to the principle of reasonableness and fairness, depending on the circumstances (*Versatel I*). The Commercial Chamber plays a prevalent role in this context, as it enjoys a broad discretion to take any immediate measures that it deems necessary, even if they deviate from mandatory statutory law. Of course, this still leaves a lot of uncertainty for practitioners, which has been criticized in the literature. One of the relevant circumstances to judge the reasonableness and fairness is the presence of independent directors who negotiate the freeze-out. However, this has also been subject to critique.

## The *Shell* case

1. **Facts.** The Shell case concerned a case before the Commercial Chamber on the use of a merger that was structured in such a way that all minority shareholders were cashed out.[[447]](#footnote-447) Royal Dutch Shell PLC (“Shell”) had launched a takeover bid on the shares of the NV Koninklijke Nederlandsche Petroleum Maatschappij (“Koninklijke”) and acquired 98,5% of the shares. After this, Koninklijke merged into its own subsidiary, Shell Petroleum NV. The merger was structured in such a way that only Shell received shares in Shell Petroleum NV, while the minority shareholders only received cash. The reason for this was the exchange ratio of the merger and the fact that the value per share was set extremely high after a change in the articles of association of Shell Petroleum NV (cfr. article 2:311, 2, in fine Dutch Civil Code). Hence, the minority shareholders were effectively cashed out by the merger, very much like in a squeeze-out procedure. The reasons why Shell opted for a merger instead of a squeeze-out were of a fiscal and practical nature.[[448]](#footnote-448) Some of the minority shareholders, the Trafalgar Funds, filed a suit with the Commercial Chamber against the merger, alleging that it constituted a violation of (*inter alia*) article 1 FP ECHR and the principle of reasonableness and fairness in article 2:8 of the Dutch Civil Code.
2. **Ruling.** The Commercial Chamber described the merger with the cash payments for the minority shareholders as a “pseudo-squeeze-out route”.[[449]](#footnote-449) It referred approvingly to the parliamentary documents concerning the merger legislation, which stated that (freely translated) *“it is not the intention of the legislator that a merger is used to freeze-out minority shareholders”*.[[450]](#footnote-450) According to the Commercial Chamber, the structure used in the case was clearly intended as a freeze-out, as was evidenced by the change in the articles of association shortly before to ensure that the minority shareholders would only receive cash.[[451]](#footnote-451) Therefore, the Commercial Chamber held that the merger structure was used illegitimately in this case and violated the principle of reasonableness and fairness.[[452]](#footnote-452)
3. **Conclusion and critique.** The *Shell* case law can be considered as an application of the idea of *Versatel I* that a freeze-out merger must have other purposes than the removal of minority shareholders alone, which is similar to the “business purpose test” that used to exist in the United States. The court reasons that if the minority shareholders receive only cash, freezing out the minority shareholders must have been the intention of the majority shareholders. Hence, the cash only freeze-out merger is invalid. As seen above, this can be circumvented by structuring the transaction as a stock merger that dilutes the minority below the squeeze-out threshold, which was considered to be valid in *Versatel I*.

The reliance of the court on other business purposes can be criticized, as discussed above in paragraph 176: it creates unnecessary uncertainty and places the focus too much on the purpose behind the freeze-out (which is actually irrelevant for the protection of minority shareholders) and not enough on the fairness of the financial compensation, which is the main concern of most minority shareholders. In addition, Raaijmakers and van der Schee have also suggested reopening the debate on the possibility of cash mergers as a freeze-out technique.[[453]](#footnote-453) From an economic perspective, this is a very appealing idea, as will be further discussed in chapter 8.

## Conclusion

1. **Synthesis of case law.** The conclusion from the case law above is that a merger and other corporate reorganization techniques can be used to freeze out minority shareholders. However, if this is the only goal of the transaction, it can be contrary to the principle of reasonableness and fairness in article 2:8 of the Dutch Civil Code, depending on the circumstances *(Versatel I (SC))*. The question then arises: which circumstances are relevant in determining the validity of an alternative freeze-out technique such as a merger?
2. **Other business purposes.** A first relevant element is the presence of reasons other than removing the minority shareholders. As noted above in paragraph 174, this can be interpreted very broadly, including tax reasons and the desire to integrate both companies legally and financially.[[454]](#footnote-454)
3. **Transparency.** A second important element is transparency. The intention to freeze out the minority shareholders should be announced in the offer documents of the preceding takeover bid.[[455]](#footnote-455) Almost all offer documents now contain an enumeration of the possible post-bid freeze-out techniques, including a reference to “all other legally permissible techniques”.
4. **Independent directors.** Third, in implementing the freeze-out, the supervisory board *(raad van commissarissen)* should remain independent from the majority shareholder, in accordance with the Code Tabaksblat (*Versatel II*).[[456]](#footnote-456) The majority may not let itself be guided exclusively by its own interest and must provide for sufficient procedural safeguards for the minority shareholders.[[457]](#footnote-457) In the *Versatel II* case[[458]](#footnote-458), the Commercial Chamber even appointed a committee of independent directors with the exclusive competence to negotiate the freeze-out merger, similar to the special committee of independent directors that is standard practice under Delaware law (see above in paragraph 83).
5. **Fair compensation.** A fourth element is that the exchange ratio in the merger should be reasonable and determined by an independent expert.[[459]](#footnote-459) This independent expert can be an accountant, but the *Leyinvest* case showed that the accountant may not already be linked to the majority shareholder or target company.[[460]](#footnote-460) In addition, the exchange ratio of the merger should not be constructed in such a way that the minority shareholders do not receive any shares in the surviving company, but only cash.[[461]](#footnote-461)
6. **“Pre-cooked freeze-outs”.** Finally, an interesting recent development in Dutch freeze-out practice is the use of so-called “pre-cooked” or “pre-wired” freeze-outs.[[462]](#footnote-462) Under this transaction structure, the post-acquisition freeze-out techniques are already prepared beforehand. The merger agreement or the agreement concerning the sale of all assets and liabilities is already negotiated before the takeover bid and is announced in the offer documents. Hence, the board of directors of the target company does not only take a position on the consideration in the takeover bid, but also on the post-acquisition freeze-out techniques. This means that both the takeover bid and the freeze-out become part of the negotiation process between bidder and target. In principle, the consideration in the freeze-out is the same as in the preceding takeover bid.

The advantage for the bidder with these pre-cooked freeze-outs is that the freeze-out can be organized faster after the takeover bid and in a more efficient manner.[[463]](#footnote-463) The advantage for the minority shareholders is that the members of the board of directors, which are at the moment of the takeover bid still independent from the bidder, take a larger and more explicit responsibility in ensuring that the interests of all stakeholders (especially the minority shareholders) are also respected in the post-acquisition freeze-out.[[464]](#footnote-464) This evolution recognizes that a takeover bid and the post-acquisition freeze-out are merely two prongs of one transaction, with the goal for the bidder to acquire full control over the target company.

1. **Trend towards convergence?** In conclusion, recent Dutch case law allows alternative freeze-out techniques, such as mergers, de facto mergers and dispute divisions, to be used to freeze-out minority shareholders, but only under certain circumstances. These circumstances primarily concern the presence of other business reasons for the merger, the transparency of the process, the presence of independent directors to protect minority shareholders, and the determination of a fair compensation for the minority shareholders that are frozen out.

The development in the Dutch case law on alternative freeze-out techniques suggests that the law in the Netherlands might be converging towards the law in the United States (discussed above in chapter 3), which also allows mergers to be used as freeze-outs if the conditions of fair price and fair dealing are met. Nevertheless, some fundamental differences with the law on freeze-outs in the United States remain, which will be discussed in chapter 7. In general, the law in the Netherlands is still not as flexible as in the United States (even though being more flexible already than most other European states). As will be discussed further in chapter 8 on the economic analysis of freeze-outs, this makes the law in the Netherlands more economically efficient than the law in other European countries, but less efficient than the law in the United States.

# Alternative freeze-out techniques in Belgium

## Introduction

1. **Alternative freeze-out techniques.** As discussed above in part 4.4.3, Belgium has two types of squeeze-outs, like the Netherlands: the stand-alone squeeze-out and the post-takeover squeeze-out. These are only possible at the very high threshold of 95% of the securities carrying voting rights.[[465]](#footnote-465) This raises the same question as in the Netherlands: can alternative techniques, such as for example a merger or de facto merger, be used to freeze out minority shareholders?
2. **Avoiding the 95% threshold.** By using alternative freeze-out techniques, the high threshold of 95% can be avoided. Indeed, mergers only have to be approved by a three-quarter majority of the votes at the shareholders’ meeting (article 699 Belgian Companies Code). A sale of all assets can even be decided by the board of directors with a simple majority.[[466]](#footnote-466) Nevertheless, a subsequent liquidation (the second step of a de facto merger) must be approved by a three-quarter majority of the votes at the shareholders’ meeting (article 645 *iuncto* article 558 Belgian Companies Code).
3. **Absence in literature and practice.** In contrast with the Netherlands, there is almost no literature on alternative freeze-out techniques in Belgium. None of the articles on squeeze-outs[[467]](#footnote-467) contain any reference to alternative freeze-out techniques, and the handbooks on mergers[[468]](#footnote-468) only contain one or two paragraphs on this topic, if anything at all. From this can be deducted that alternative freeze-out techniques are not used in practice.[[469]](#footnote-469) The reason for the absence in practice of alternative freeze-out techniques is probably a combination of the legal uncertainty associated with alternative freeze-out techniques and the relatively low importance of Belgian capital markets. Also, Belgium has always been more reluctant to follow American practices (including freeze-outs) than the Netherlands. Finally, most takeover bids in Belgium succeed in reaching the high threshold of 95%[[470]](#footnote-470), which makes the use of alternative freeze-out techniques unnecessary, as the more certain squeeze-out procedure can be used. Nevertheless, there are some cases, especially in going-private situations, were the threshold of 95% does raise a problem. In addition, the higher threshold implies that the bidder will have to offer a higher price to attract more shares.[[471]](#footnote-471) Therefore, even if this threshold is often reached in practice, this does not mean that the discussion about the applicable threshold is irrelevant.
4. **Transics and Spadel.** In the Transics case, the controlling shareholder of Transics wanted to take the company private, but succeeded in acquiring only around 75% through a takeover bid. It considered the use of alternative freeze-out techniques to freeze out the remaining minority shareholders.[[472]](#footnote-472) However, the plans of a delisting were later abandoned.[[473]](#footnote-473) Therefore, we speculate that the reason for this is that controlling shareholder did not consider these techniques a valid route to avoid the 95% threshold.

More recently, a group of minority shareholders in Spadel gathered just above 5% of the shares, enough to block a squeeze-out by the controlling shareholder and prevent a delisting.[[474]](#footnote-474)

1. **Real-Dolmen Merger.** On the other hand, a merger has been used in the past after a takeover bid to integrate the bidder and the target. In the case of Real-Dolmen[[475]](#footnote-475), for example, Real launched a friendly takeover bid on Dolmen, and announced in the offer documents that it would proceed with a merger of Dolmen into Real if the squeeze-out threshold would not be reached. Since Real acquired 82,45% of the shares, it proceeded with the merger. However, this was not a pure freeze-out merger. The merger was also justified by commercial reasons, as both companies were active in the ICT sector and integrating both companies in one combined entity would lead to operational synergies. Hence, the merger was not (solely?) intended as a freeze-out technique, which is probably the reason why it was not challenged.
2. **Validity of alternative freeze-out techniques?** In conclusion, like in the Netherlands, the important question is whether the use of these techniques from general company law to freeze-out minority shareholder is valid, especially under the doctrine of abuse of majority. In the next part, we first discuss the concept of abuse of majority in general. Then, we apply this concept to freeze-outs, based on some cases.

## “Abuse of majority” in general

1. **The concept of “abuse of majority"**. The main defence against the use an alternative freeze-out technique would be the concept of “abuse of majority”. Abuse of majority is an application of the general theory of abuse of rights *(“rechtsmisbruik” / “abus de droit”)* to the right to vote in the general assembly of a company. [[476]](#footnote-476) Under Belgian law, a decision of the general assembly, including a decision to merge, can be annulled if it constitutes an abuse of majority (article 64, 3° Belgian Companies Code).[[477]](#footnote-477),[[478]](#footnote-478) In addition, an additional or substituting indemnification is also possible in case of abuse of majority.[[479]](#footnote-479)
2. **Nature of the right to vote**. To determine whether there is an abuse of a right, it is necessary to establish what the normal use or the purpose of a right is. However, it is precisely on this point that the literature is split.[[480]](#footnote-480) Some authors state that the right to vote of a shareholder is purely functional and can only be exercised in the interest of the company.[[481]](#footnote-481) However, a majority of the authors claims that the right to vote is a mixed right that should be exercised both in the interest of the shareholder as well as in the interest of the company. [[482]](#footnote-482) Finally, some authors argue that the right to vote is a right that can be exercised in the sole interest of the shareholder, but that it is limited by the theory of abuse of rights (*abus de droit / rechtsmisbruik*), very much like a “unilateral party decision” (*partijbeslissing / decision d’intérêt commun*).[[483]](#footnote-483) The latter approach seems most correct to us. However, differences between these conceptions should not be overstated: all authors accept that the vote of a shareholder can in some circumstances be void due to an abuse of majority and that a court should review this only marginally.[[484]](#footnote-484)
3. **Criteria**. The question arises when there is an abuse of majority. Even though the traditional view used to require an intentional element[[485]](#footnote-485), it is now widely accepted that an abuse of the right to vote should be evaluated objectively: there is abuse if the right to vote has been used in a way that manifestly exceeds the normal exercise by a prudent and diligent person.[[486]](#footnote-486) In addition, the same specific criteria as in the general theory of abuse of rights apply[[487]](#footnote-487):
4. the exercise of the right to vote with the sole intention to harm another shareholder or the company,
5. the exercise of the right to vote without any valid reason in a way that harms another shareholder or the company,
6. to choose for the most harmful exercise of the right to vote when other less harmful measures are also possible,
7. the exercise of the right to vote to gain an advantage that is disproportionate to the disadvantage for another shareholder or the company.

## Application of “abuse of majority” to alternative freeze-out techniques

1. **General.** There is little literature and case law on abuse of majority and freeze-out techniques. However, materials that do discuss this topic suggest that using a merger, dissolution or other technique, solely to push out a minority shareholder, would constitute an abuse of majority.[[488]](#footnote-488) We now briefly discuss some cases that apply the abuse of majority concept to such alternative freeze-out techniques.
2. **Court of Commerce Namur (1950).** In a case of 2 February 1950[[489]](#footnote-489), the Court of Commerce of Namur had to rule on a situation that was a clear example of abuse.[[490]](#footnote-490) In this case, the shareholders decided on the dissolution of a closely held company. However, the person appointed as the liquidator was the father-in-law of one of the group of controlling shareholders. The liquidator then transferred all of the assets of the company to his son-in-law, who contributed these assets to a newly found corporation. Hence, the business of the corporation was continued without the minority shareholder.The court held that this was an abuse of majority, because there was collusion between the liquidator and the controlling shareholders. This was especially true since the minority shareholder had offered to buy the assets at a higher price, and had not been transparently informed of the sale of all assets. The court concluded that the only goal of the transaction was to eliminate the minority shareholders, and hence should be annulled because of abuse of majority.

This case law of the court is in line with other case law, which held that measures that have as their *actual* purpose the elimination of minority shareholders are illegitimate and hence null and void.[[491]](#footnote-491)

1. **Court of Commerce Brussels (1991).** A more recent interesting case on alternative freeze-out techniques is the decision of the Court of Commerce in Brussels on 31 May 1991.[[492]](#footnote-492)This case concerned a closely held cooperative corporation (*coöperatieve vennootschap*). The controlling shareholders decided to change the articles of association of the corporation to include a clause that allowed shareholders to be excluded from the company by a decision from the shareholders’ meeting.[[493]](#footnote-493) Shortly after this, the shareholders’ meeting proceeded to use this clause to exclude one of the minority shareholders from the company. The court held that both decisions of the shareholders were affected by an abuse of majority, and hence were null and void. Indeed, the only goal was to exclude a minority shareholder, and the controlling shareholder did not show how this was justified in the corporate interest.

This decision was criticized by Nelissen Grade, who argued that the court infringes the principle of marginal review and subsituted it own judgment concerning the corporate interest for that of the shareholders.[[494]](#footnote-494) However, this critique is unfounded, in our opinion. In casu, the transaction was clearly a “conflicted transaction”, as the controlling shareholder had opposing interests to the minority shareholders. In such a situation, it makes sense to shift the burden of proof on compliance with the corporate interest to the controlling shareholder,[[495]](#footnote-495) and the court correctly reviewed the transaction in a strict manner. This conclusion would have been different, in our opinion, if the transaction had been approved by independent directors or by (a majority of) the minority shareholders, as then an at arm’s length process would have been simulated.

1. **Putting these cases in context.** The cases discussed above should be put in their context, however. There are only a few of them and they are very old. In addition, they all conern disputes in the context of closely held companies, while the present master thesis studies listed companies. In closely held companies, the idea that shareholders are investors that are purely concerned with the financial value of the shares,[[496]](#footnote-496) does not apply. Indeed, the shareholders of a closely held company are often also active in the management of the company, and the implication in the business is often *intuitu personae*. Hence, the logic that freeze-outs should be possible as long as they are performed at a fair price does not hold for closely held companies.

Finally, the court not only annulled the transaction because of the intention to eliminate the minority shareholders, but also because of the unfair price and procedure. Indeed, in many of these cases, the procedure was not transparent and involved directors with a strong conflict of interest, while in others the price was not adequate, as higher offers had been made. All these issues imply that it is doubtful that this case law on alternative freeze-out techniques in closely held companies will be (and should be) extended to listed companies. So far, this question has not been answered in the Belgian case law, unlike in the Netherlands.

## Conclusion

1. **Conclusion.** In conclusion, there is little literature and almost no practice on the use of alternative freeze-out techniques, in contrast with the Netherlands. While mergers and de facto mergers can theoretically be used to freeze out minority shareholders, this might constitute an abuse of majority. Indeed, some case law has indicated that the use of these techniques with the sole purpose of eliminating minority shareholders is invalid. Instead, these techniques should (also) serve the corporate interest.[[497]](#footnote-497) However, these cases were old and concerned closely held companies. Therefore, it is currently still uncertain whether alternative freeze-out techniques in listed companies will be considered valid by the Belgian courts.

# Comparative chapter

## Comparison between the EU and the US

1. **Overview of the chapter.** In this chapter, we compare the legal systems that we have described above: the United States (in fact only the state of Delaware[[498]](#footnote-498)), the European Union, the Netherlands and Belgium. We first compare the United States with the European Union in this part, after which we compare the United States with the Netherlands and Belgium in part 7.2. As discussed in paragraph 21 of the introduction, we will use the method of “comparative law and economics”, a variant of the functional method of comparative law.
2. **Legal technique: cash merger vs. squeeze-out.** Both the United States and Europe know the concept of freeze-outs. However, the formal technique that each country uses to effectuate a freeze-out is quite different: while the United States mainly rely on the technique of cash mergers from general company law to freeze out minority shareholders, Europe has introduced a *sui* *generis* technique, the squeeze-out procedure.[[499]](#footnote-499) The cash merger bases itself on a merger of the target company with the bidder, where the minority shareholders receive cash as consideration for their shares. The squeeze-out, on the other hand, is based on a forced transfer of the shares from the minority shareholders to the majority shareholders. Nevertheless, the result is functionally the same, as under both techniques, the minority shareholders are cashed out and the majority shareholder becomes owner of all the shares. Hence, the difference is largely of a formal nature.
3. **Threshold: 50% vs. 90-95%.** A more important difference, however, is that it is much easier to freeze out minority shareholders in the United States than in Europe.[[500]](#footnote-500) Indeed, freeze-out cash mergers are available at a threshold of 50% of the shares in the United States, while the European squeeze-out is only available at a threshold of 90-95% (cfr. paragraph 129).
4. **Explanation of the difference in threshold.** Ventoruzzo has offered many explations for this difference in threshold between the United States and Europe.[[501]](#footnote-501) First, the competition for corporate charters between American states might have driven Delaware to an ever more flexible corporate law, which also explains the flexible regime for freeze-outs. Second, Ventoruzzo argues that the costs of a listing are higher in the United States, especially due to the higher costs of litigation by minority shareholders. This creates a higher demand for delistings and hence for a flexible regime for freeze-outs. Third, European states with their shareholder structure of concentrated ownership might prefer a less flexible regime for freeze-outs as a form of protection against hostile takeovers. Indeed, takeovers become less attractive due to the presence of minority shareholders.

However, in our view the most convincing explanation is the different legal culture and specifically the different view on shareholders: while in Europe, a shareholder is regarded as a holder of property rights, the United States view a shareholder as an investor with only a financial interest in the company.[[502]](#footnote-502) In the first view, freeze-outs can be regarded as a restriction of property rights, except in extreme circumstances (such as a high percentage of share ownership), while in the second view, freeze-outs can be allowed as long as shareholders are guaranteed the fair value of their investment. The American approach is illustrated by the following quote of Ventoruzzo: *“the emphasis in terms of protection of minorities is not based on an absolute right for minorities to remain shareholders, but rather on ensuring that the cashed-out investors obtain the fair value of their shares.”[[503]](#footnote-503)* Or as Gevurtz puts it even more sharply: *“shareholders are investors, not sentimental collectors”*.[[504]](#footnote-504)

Geens has argued that the idea of the shareholders as an investor in the company (instead of the shareholder-proprietor), which originates in financial law, is also infiltrating company law in Europe.[[505]](#footnote-505) However, he warns that this distinction is to some extent a false dilemma: it is only logical that a small shareholder of a listed company is mainly an investor, and not a co-proprietor of the company.[[506]](#footnote-506) In addition, as we concluded above in paragraph 153, even if a freeze-out is regarded as a restriction of the right to property right, this restriction could be justified in the public interest, provided that fair compensation is paid. Hence, the European view on shareholders does not necessarily exclude a lower threshold for freeze-outs, but it is perhaps less obvious as under the American view.

These differences in view on the position of the shareholder certainly warrant further research, and this debate goes beyond the scope of this master thesis. In this master thesis, we will proceed under the assumption of the shareholder as investor, at least for listed corporations (see further in paragraph 246). Nevertheless, it should be kept in mind that this is not necessarily a binary choice between two extreme views.[[507]](#footnote-507)

1. **Presumption of fair price: 50% vs. 90%.** Both the United States and Europe require that the minority shareholders are frozen out at a “fair price”[[508]](#footnote-508), which is logical since freeze-outs are essentially a private expropriation. However, the concretisation of this requirement, especially regarding the presumption of a fair price if a certain number of shareholders have accepted the bid, is again quite different in the United States and in Europe.[[509]](#footnote-509) In the United States, acceptance by a simple majority of the minority is sufficient to establish a presumption of a fair price (cfr. *Getty Oil* and *Kahn* – see paragraphs 84 and 85)[[510]](#footnote-510), while the Takeover Directive in Europe requires an acceptance by 90% of the minority shareholders for establishing a presumption of a fair price (article 15(5) – see paragraph 130). The European approach on this point seems quite strict, and has been subject to critique by Kaisanlahti.[[511]](#footnote-511) Ventoruzzo and Pinta, on the other hand, have argued for increasing the American threshold to 90%.[[512]](#footnote-512)
2. **Post-acquisition freeze-outs vs. going private freeze-outs.** A similarity of the American and European regime is that both regimes are more protective for minority shareholders in going private freeze-outs than in post-acquisition freeze-outs.[[513]](#footnote-513) This is logical, as the presence of a controlling shareholder presents a risk of self-dealing, while a post-acquisition freeze-out is nothing more than the second step of an at arm’s length transaction.

In the United States, for example, post-acquisition freeze-out are allowed, provided that they are executed promptly and at the same price as the preceding takeover bid by an independent bidder (see above in paragraph 114). Going private freeze-outs, on the other hand, are subject to additional procedural safeguards, such as approval by a majority of the minority and a special committee of independent directors, in order to enjoy protection under the business judgment rule.

A similar result is reached in Europe. Post-acquistion freeze-outs can be done through the flexible “post-takeover squeeze-out” procedure regulated by the Takeover Directive (cfr. above in paragaphs 128, 133 and 135), which does not require another prospectus and which enjoys a presumption of a fair price. It should be noted that the “post-takeover squeeze-out” technique can also be used as the second step of a two-step going private freeze-out by a controlling shareholder. However, in such a case, the supermajority of the minority requirement for the presumption of fair price (90% of the shares included in the bid) still protects the minority shareholders. In addition, Belgian takeover law provides for additional protection of minority shareholders in case of a bid by a controlling shareholder, through extra duties for the independent directors and an opinion on the price by an independent expert (cfr. above in paragraph 136 and 137). This leads to a similar result as in the United States: a flexible regime for post-acquisition freeze-outs and a stricter regime for (one-step and two-step) going private freeze-outs.

1. **Fair procedure: standards vs. rules.** Another notable difference between the United States and Europe is the different approach in regulating the procedure of freeze-outs. In Europe, freeze-outs are (mainly) governed by detailed legal rules in statutory law, while the United States rely more on protection of minority shareholders through general standards that are applied by case law.[[514]](#footnote-514) The general distinction between rules and standards is that rules are precise and are given content *ex ante* (usually by the legislator), while standards are indeterminate and are only given content *ex post*, when applied by the courts.[[515]](#footnote-515) However, standards are often concretized into more specific rules through precedents of the courts, especially under common law.[[516]](#footnote-516) For example, the standard of “entire fairness” (which consists of “fair price” and “fair dealing”) plays an important role under Delaware law on freeze-outs since *Weinberger*. However, this standard has also been concretized by the courts into more specific rules on certain procedural safeguards, such as approval by a special committee of independent directors or by a majority of the minority (cfr. *Getty Oil* and *Kahn*).

In contrast, the European approach knows many precise rules. For example, European regulation provides for a presumption of fairness if 90% of the shareholders have accepted a takeover bid. If this condition is not met, most national legislation regulates how the price should be determined, for example by an independent expert, a court or the financial supervisor. This approach is quite different compared to the general standard of a “fair price” in the United States. The advantage of the European approach is that it is often more clear. However, it can also be too strict and burdensome, and not suitable for all situations.

1. **Fair procedure: internal actors vs. external actors.** The procedure for freeze-outs is also different in the United States and Europe concerning a second aspect: while the United States rely mainly on “internal actors” to protect minority shareholders (such as independent directors or a majority of the minority shareholders), Europes gives a larger role to external actors (“gatekeepers”[[517]](#footnote-517)), such as courts, the financial supervisor or independent experts.

This is especially clear in the determination of a fair price in a going-private freeze-out. American courts generally refrain from reviewing the price if it is approved by a majority of the minority shareholders and by the independent directors.[[518]](#footnote-518) In contrast, in the Dutch “stand-alone squeeze-out”, the price is determined by the court, possibly with the help of independent expert (see above in paragraph 132). Likewise, in the Belgian stand-alone squeeze-out, the bidder determines the price, but an independent expert must provide his opinion on the price. In addition, the FSMA can review this price when approving the prospectus, and the price can be challenged in the Court of Appeals in Brussels (see above in paragraph 134).

1. **Fair procedure: what is the “best” approach?** The differences described above raise the question: which approach to procedural protections for minority shareholders is more efficient? This evaluative question of the best approach will be answered further in the chapter on the economic analysis of freeze-outs. However, we want to note a caveat here from a comparative law perspective: what works in one legal system will not necessarily work as well when transplanted to another system, and should be adapted to the societal context (see above in paragraph 23).

For example, Europe relies less on litigation by minority shareholders to enforce its corporate law, as shareholder suits face many procedural obstacles.[[519]](#footnote-519) In the United States, on the other hand, suits by minority shareholders are comparatively easy, *inter alia* thanks to the possibility of class actions, contingency fees, and a plaintiff’s bar.[[520]](#footnote-520) This difference makes it more difficult to rely on standards in Europe to protect minority shareholders, as they need to be enforced *ex post* through litigation. As Ventoruzzo notes, “*in legal systems that are less reliant on litigation, the fairness of the cash-out price must be ensured by different techniques than the opportunity to challenge mergers in court.”*[[521]](#footnote-521) In addition, the absence of a system of binding precedent in continental European jurisdictions makes it more difficult for standards to be transposed into rules by the courts, which makes standards a less effective regulatory strategy.[[522]](#footnote-522) Finally, it is also questionable whether protection by independent directors and a majority of the minority shareholders works as well in the concentrated shareholder structure of continental Europe, as it does in the dispersed shareholder structure in the United States.[[523]](#footnote-523) Indeed, the presence of a powerful controlling shareholder might make the protection by these internal actors less effective.

## Alternative freeze-out techniques: US vs. the Netherlands (and Belgium)

1. **Trend towards convergence?** In the part above,we saw some fundamental differences between the American and the European approach to freeze-outs. However, the *Versatel* case law on the use of alternative freeze-out techniques in the Netherlands seems to suggest that there is a trend towards convergence between the Netherlands and the United States. Indeed, as in the United States, the Netherlands allow (triangular) mergers or de facto mergers to be used as a freeze-out technique and review such transactions under a general standard (“reasonableness and fairness”) (see chapter 5). This allows majority shareholders in the Netherlands to avoid the high threshold of 95% for squeeze-outs, since a merger requires only a two-thirds majority in the shareholders’ meeting, and a de facto merger even only an ordinary majority (see above in paragraph 160 and 161). This makes freeze-out mergers available at a low threshold, similar as in the United States. Nevertheless, some fundamental differences remain, which make Dutch freeze-out mergers still less flexible than in the United States.
2. **“Other business reasons”.** First, the principle validity of freeze-outs is more easily contestable in the Netherlands than in the United States. Indeed, in *Versatel I*, the Dutch Supreme Court ruledthat a merger that only serves to push out minority shareholders can be contrary to the principle of reasonableness and fairness (see above in paragraph 175). Hence, the court still demands that “other business reasons” are present in order for a freeze-out merger to be valid.

This is similar to the old “business purpose test” of *Singer* in the United States, which stated that a “*merger, made for the sole purpose of freezing out minority shareholders, is an abuse of the corporate process”*.[[524]](#footnote-524) The business purpose test was widely criticized in the United States, which is why it was abandoned in *Weinberger* (see above in paragraph 79). Therefore, the purpose of the freeze-out merger is now irrelevant in the United States. This makes sense in the view that the shareholder is a financial investor who is mainly interested in the fair value of his investment (see above in paragraph 211). From this view follows that the focus of the law on freeze-outs should be on guaranteeing this fair value, and not on what the purpose is behind the freeze-out merger.

1. **Uncertainty under Dutch law.** Raaijmakers has also argued that the reliance on “other business purposes” in the *Versatel* case law leads to a lot of uncertainty in Dutch freeze-out practice, by leaving the freeze-out merger open for annulment.[[525]](#footnote-525) Uncertainty is also a more general characteristic of the Dutch case law on alternative freeze-out techniques. The Dutch courts are reluctant to establish general principles and rules concerning the validity of these techniques and work heavily on a case-by-case basis. In contrast, the Delaware courts do not hesitate to assume a policy-making role, giving clear signals to legal practice through *obiter dicta*.[[526]](#footnote-526) This fact is reinforced by the principle of binding legal precedents under the common law. The result in Delaware is an impressive legal framework that is completely judge-made.
2. **Unavailability of cash mergers.** One of the most important differences between the United States and the Netherlands (as well as Belgium), is the unavailability of cash as a consideration for mergers in the latter, which complicates a freeze-out. This problem can be circumvented through the dilutive effect of a (triangular) stock merger or through a sale of all assets against cash coupled with a liquidation (a “de facto merger”). Nevertheless, the absence of cash mergers leads to more complex transaction structures in Dutch freeze-out practice to accomplish the same result. Therefore, some authors have proposed that the legislator should allow cash mergers,[[527]](#footnote-527) which would eliminate this extra layer of complexity and make the law on freeze-outs more flexible.
3. **Different remedy: appraisal vs. nullity.** Another difference between the United States and the Netherlands concerns the remedies that are available against the freeze-out. In the Netherlands, a freeze-out technique that violates the principle of reasonableness and fairness can be annulled by the court (see above in paragraph 165). In addition, minority shareholders can also try to block the merger by filing for an investigation procedure (*enquêteprocedure* – see above in paragraph 166).

In contrast, the American appraisal remedy does not block or annul the merger, but instead awards the fair value of the shares to the shareholders who have filed the appraisal remedy (see above in paragraph 59). The minority shareholders can also challenge the freeze-out on the basis of a breach of fiduciary duty, even with a class action. In this case, nullity of the freeze-out is theoretically possible as a remedy, but courts normally resolve cases by awarding damages (see above in paragraph 70). Therefore, this remedy can be called a “class appraisal”.[[528]](#footnote-528)

Raaijmakers as well as other authors have suggested that the American approach that relies on the appraisal remedy is better suited: the minority shareholders receive a right of compensation equal to the fair value of their shares, but no right to block the freeze-out (as is still possible today).[[529]](#footnote-529) This relates to the idea of the shareholders as an investor, with no absolute right to remain a shareholder, but a right to the fair price of his investment (see above in paragraph 211).

1. **Conceptual ambiguities: post-acquisition vs. going private freeze-outs.** Finally, the case law on alternative freeze-out techniques in the Netherlands is not as conceptually clear as in the United States. Dutch law on alternative freeze-out techniques does not make the important distinction between freeze-outs after an independent takeover bid (“post-acquisition freeze-outs”), which should be treated more flexibly, and freeze-outs by a controlling shareholder that wants to acquire all shares to take the target company private (“going private freeze-outs”), which should be treated more strictly.[[530]](#footnote-530)

All of the cases discussed in chapter 5 on Dutch law concerned post-acquisition freeze-outs. Still, the Dutch courts failed to see that in such cases, the consideration offered in the post-acquisition freeze-out can be assumed to be appropriate if it is the same as the consideration offered in the preceding takeover bid, because the latter was made on an at arm’s length basis. Hence, additional procedural safeguards, such as the additional committee of independent directors that was required in *Versatel II*, are unnecessary (cfr. the critique in paragraph 181). The post-acquisition freeze-out is in such case the mere implementation of the second step of the takeover process, which was negotiated at arm’s length. This is of course different for two-step going private freeze-outs, where the preceding takeover bid is not launched by an independent bidder but by a controlling shareholder.

However, the use of pre-cooked freeze-out transactions (see above in paragraph 192) means that practice in the Netherlands is converging towards a model for post-acquisition freeze-outs that is more similar to the Delaware model, as the two steps (the takeover bid and the post-acquisition freeze-out) are treated as a whole. As will be discussed further, this makes more sense from an economic perspective (see further in chapter 8 in paragraph 251).

1. **Comparison with Belgium.** Theoretically speaking, alternative freeze-out techniques are also possible in Belgium. However, there is little literature and almost no practice on the use of alternative freeze-out techniques, in contrast with the Netherlands (see above in paragraph 196). Therefore, the Dutch trend of convergence towards the American model of flexible freeze-outs has not yet begun in Belgium. In the next chapter, we will argue why the Belgian courts should embrace the Dutch trend of freeze-out mergers, taking into account the critique on this case law that we formulated above (see paragraphs 176, 181 and 186). However, it seems that Belgian courts are reluctant to follow the Dutch (let alone the American) model, as appears from the case law discussed in paragraphs 204 and 205.

## Conclusion

1. **US vs. EU.** In conclusion, the law on freeze-outs is quite different in the United States from the law in Europe. In the United States, the cash merger is the most used freeze-out technique, while in Europe, the squeeze-out is most important. This also corresponds to a different threshold for freeze-outs: 50% of the shares in the United States compared to 90-95% in Europe. In addition, the determination of the fair price and the approach to the procedural protection of minority shareholders is different.
2. **US vs. the Netherlands and Belgium.** These fundamental differences between the United States and Europe are diminished by the recent evolution in the Netherlands, which allowed mergers and de facto mergers to be used as alternative freeze-out techniques. However, in other countries, such as Belgium, the use of such alternative freeze-out techniques is still not clearly accepted by the courts and used in practice. In addition, the trend towards convergence is far from complete in the Netherlands, as some important differences remain.
3. **Questions.** These different approaches to freeze-outs raise some questions: which approach is most efficient? And is this Dutch evolution towards the American model a positive evolution? To answer these questions, however, we cannot rely on techniques from comparative law alone. For this reason, the next chapter use an economic analysis of the law on freeze-outs to evaluate the efficiency of the existing legal systems and to make some suggestions for improvement of the European regime.

# Economic analysis of freeze-outs

## Introduction

1. **Overview.** In this chapter, we evaluate the economic efficiency of the different freeze-out regimes studied in the previous chapters. We will first discuss the theoretical framework for analysing freeze-outs. The theoretical framework will consist of the three collective action problems discussed in the law and economics literature on the market for corporate control (the free rider problem, the pressure to tender problem and the holdout problem – see further in this chapter), as well as the framework of Subramanian[[531]](#footnote-531) and Brudney & Chirelstein[[532]](#footnote-532). Afterwards, in part 8.5, we will apply this framework to determine the main building blocks of an efficient legal framework on freeze-outs.
2. **Economic efficiency: the sole owner standard.** As discussed in paragraph 25 of the introduction, economic efficiency is operationalized as Kaldor-Hicks efficiency: wealth for society as a whole is maximized, and the losses suffered by the “losers” can be (not: will be) compensated by the benefits of the “winners”. Concretely, this is translated in the context of takeovers into the following requirement: all value increasing takeovers succeed and only value increasing takeovers succeed.[[533]](#footnote-533) A takeover is considered as value increasing if the value of the company to the bidder is higher than the sum of the value to the shareholders under current management and the costs for the bidder in launching the takeover bid.

This standard is also referred to as the “sole owner standard” or the “undistorted choice standard”: a sole owner whose choice is undistorted would only sell his asset if the buyer is willing to pay more than the value of the asset to the sole owner.[[534]](#footnote-534) In the case of a corporation, the “sole owner” is equated with a majority of the shareholders.[[535]](#footnote-535) Under this standard, assets are allocated to those who value them the most, *i.e.* where they are most productive.

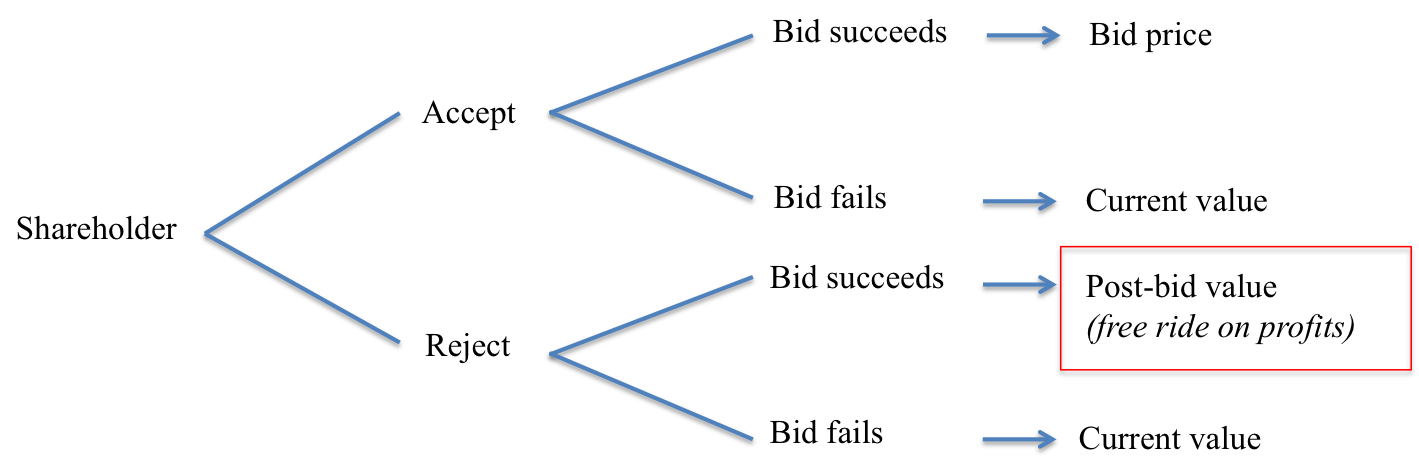
1. **Critique of Schwarz: the market standard.** Nevertheless, Schwarz criticizes the sole owner standard and argues in favour of a “market standard”.[[536]](#footnote-536) He reasons that the financial markets are a better judge of the value of shares than the majority of shareholders, as markets efficiently reflect the value of shares. Therefore, any bid over the market price of shares is value increasing and should succeed. Bebchuk has counter-argued to this that market prices are dynamic and often rise after the announcement of a takeover bid, sometimes even above the bid price.[[537]](#footnote-537) Moreover, Bebchuk also mentions that efficiency of the markets has not yet been sufficiently proven.[[538]](#footnote-538) Therefore, the market standard does not seem superior to the sole owner standard, and we will use the latter for the present master thesis.

## Free rider problem

1. **Grossman and Hart.** A first problem in the market for corporate control is the free rider problem. In a seminal paper, Grossman and Hart first described this problem.[[539]](#footnote-539) The free rider problem results from the fact that the shareholders of a company that is the target of a takeover bid assume that the bidder will make the company more profitable, as otherwise he would not have made the bid. Therefore, rather than accepting the bid, the shareholders hold on to their shares, in order to free ride on the profits that they assume the bidder will make. However, if too many shareholders will reason that rejecting the tender offer is the best course of action for them individually, this will cause the bid to fail, even though the shareholders collectively want it to succeed.[[540]](#footnote-540) Hence, the free rider problem prevents value increasing takeovers from taking place.

The assumption in this model is that the shareholders are atomistic: they are so small that the chance that their decision will impact the outcome of the bid is negligible.[[541]](#footnote-541) Hence, they will not take their impact on the success of the bid into account when deciding whether to tender or not.

In figure 7 below, we show the decision tree of a shareholder facing the free rider problem. We assume that if the bid fails, the bidder does not buy any shares and the shareholders therefore keep their shares at the current value.[[542]](#footnote-542) On the other hand, if the bid succeeds and the shareholders have accepted the bid, the shareholders receive the bid price. However, the problem here is that the shareholders assume that the post-bid value of the shares[[543]](#footnote-543) will be higher than the bid price, so that they are individually better of rejecting the tender offer if the bid succeeds (see the square in figure 7).



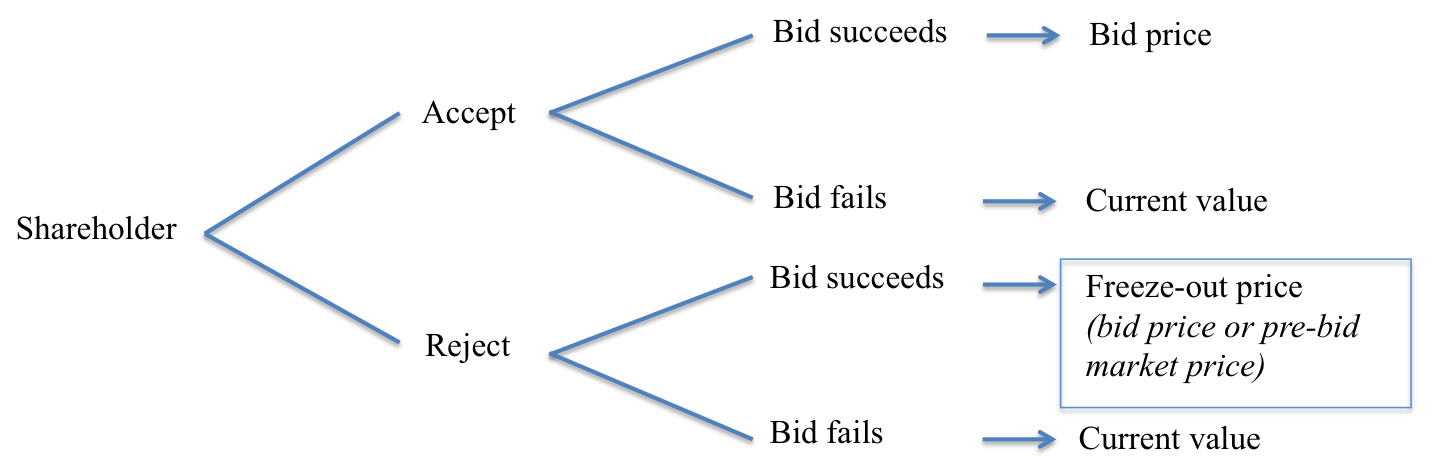
*Figure 7. The free rider problem described by Grossman and Hart.*

To solve the free rider problem, Grossman and Hart proposed that shareholders would voluntarily agree to allow the bidder to extract private benefits from the company at the disadvantage of the minority shareholders (which they call “dilution”).[[544]](#footnote-544) This would discourage shareholders from free riding and hence solve the problem. From an *ex ante* perspective, this is also beneficial for the shareholders themselves: the solution of the free rider problem facilitates efficient freeze-outs, which in turn leads to a higher price for the shares.

1. **Critique on Grossman and Hart.** Many authors have expanded and criticized this model of Grossman and Hart.[[545]](#footnote-545) While the identification of the free rider problem is shared by most authors, the solution of voluntary dilution by shareholders is certainly not. Indeed, this would violate corporate law as it exists today in most countries. Therefore, many authors have argued in favour of the introduction of freeze-outs of minority shareholders instead of the solution proposed by Grossman and Hart, as this would also solve the free rider problem, but in a more efficient and fair way.[[546]](#footnote-546)
2. **Amihud, Kahan and Sundaram (AKS).** Amihud, Kahan and Sundaram (“AKS”), for example, build further upon the model of Grossman and Hart, as well as on the extensions of this model by Yarrow[[547]](#footnote-547) and Gomes[[548]](#footnote-548). They propose a freeze-out mechanism in which the price is set at the maximum of two variables, the “pre-bid market price” and the “bid price”.[[549]](#footnote-549) Gomes had already proposed a freeze-out rule with a price equal to the bid price[[550]](#footnote-550), but the lower bound of the pre-bid market price in the AKS model improves the Gomes model because it eliminates certain value-decreasing takeovers from taking place.[[551]](#footnote-551) The AKS model makes no assumption that the shareholders are atomistic and works even for companies with a concentrated shareholder structure.[[552]](#footnote-552)

The decision tree in figure 8 shows that freeze-outs solve the free rider problem: individual shareholders no longer take into account the post-bid value of their shares. Instead, they will compare the bid price with the current value of the shares to decide whether or not to accept the bid. This corresponds to the criterion of efficiency defined above in paragraph 228.

The AKS model leads to efficient outcomes: all value increasing takeovers succeed and only value increasing takeovers succeed. In addition, the freeze-out solution proposed by AKS has as an advantage over the Grossman-Hart Model that it is consistent with current law and practice, at least in the United States (cfr. part 3.6 on post-acquisition freeze-outs).[[553]](#footnote-553) Indeed, minority shareholders can be frozen out at the price of a preceding independent takeover bid, if the post-acquisition freeze-out is executed promptly after the takeover bid. In addition, the American appraisal remedy guarantees that shareholders receive at least the pre-bid market price, should the bid price be lower than this (see above in paragraphs 62 and 102). Hence, the solution of AKS is achieved in the United States: freeze-outs at the maximum of two amounts, the bid price and the pre-bid market price.



*Figure 8. The free rider problem solved by freeze-outs under the AKS model.*

However, a problem with the AKS model is that there should be no takeover premia under the model, as a bidder could put the bid price right at the pre-bid market price and the shareholders would still tender their shares due to the lack of a better alternative.[[554]](#footnote-554) This absence of takeover premia is contrary to what we observe in practice, as shareholders often receive part of the synergies that the bidder will make from acquiring the target company. The AKS model solves this by introducing the possibility of competition by other bidders, as also modeled by Fishman[[555]](#footnote-555). This would lead to takeover premia (a higher bid price than the pre-bid market value) for shareholders. However, the outcome of this refinement of the model is that negative takeover premia should also be allowed in some cases,[[556]](#footnote-556) which is almost impossible in practice. Therefore, AKS argue that if we disallow negative takeover premia, the model can only be “constrained efficient”: a takeover succeeds if the bidder values the target more than the pre-bid market price, but the existing shareholders might value the company more than is reflected in the pre-bid market price.[[557]](#footnote-557) This is the most we can expect if negative takeover premia are not feasible.

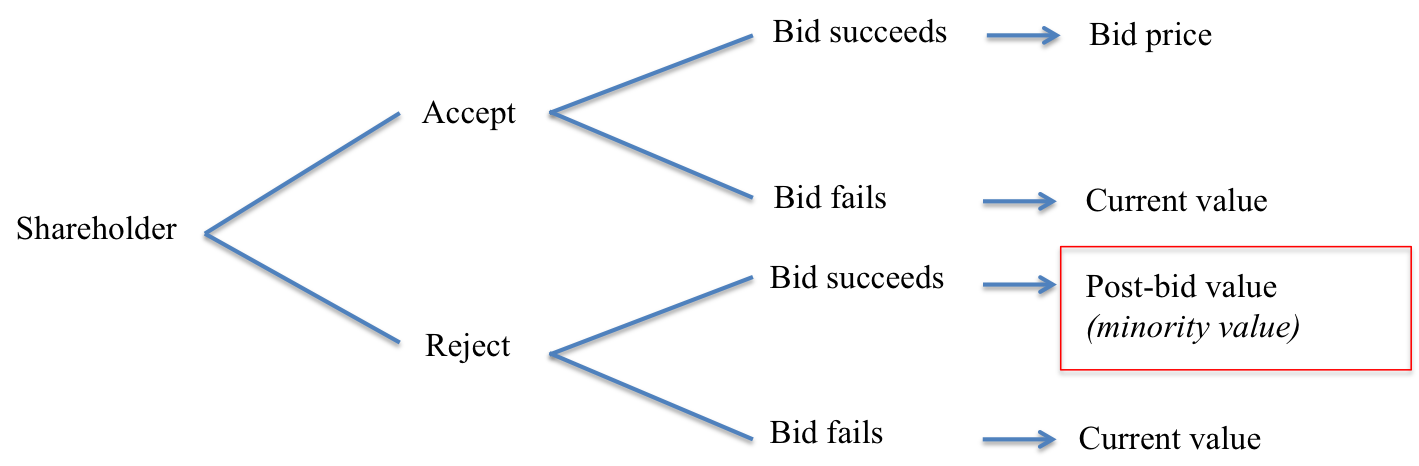
In conclusion, the AKS model is the most sophisticated model available on the free rider problem and freeze-outs. This model will be used in the present master thesis as the basis for the economic analysis of the different freeze-out regimes.

1. **Reception in the Takeover Directive.** This literature on the free rider problem was also taken into account when the EU introduced the squeeze-out right in the Takeover Directive.[[558]](#footnote-558) Burkart & Panunzi and Van der Elst & Van den Steen have applied the framework discussed above to the European situation and came to the conclusion that the squeeze-out procedure in the Takeover Directive can prevent the free rider problem, like the American freeze-out merger. [[559]](#footnote-559) However, they point out that if we consider that shareholders differ in their valuation of the company, the high threshold in the EU might prevent some value increasing takeovers from taking place.[[560]](#footnote-560) Indeed, in such case, the bidder must offer a higher takeover premium to attract enough shareholders in order to reach the threshold, which might cause some efficient takeovers to be no longer profitable for the bidder, and hence not occur. In addition, there is no reason to believe why a minority of the shareholders is more likely to be right than a majority of the disinterested shareholders[[561]](#footnote-561) about the valuation of the company, indicating that a threshold of 50% of the shares (excluding the shares that the bidder and its affiliates held previous to the takeover bid) is more appropriate.[[562]](#footnote-562)

## Pressure to tender problem

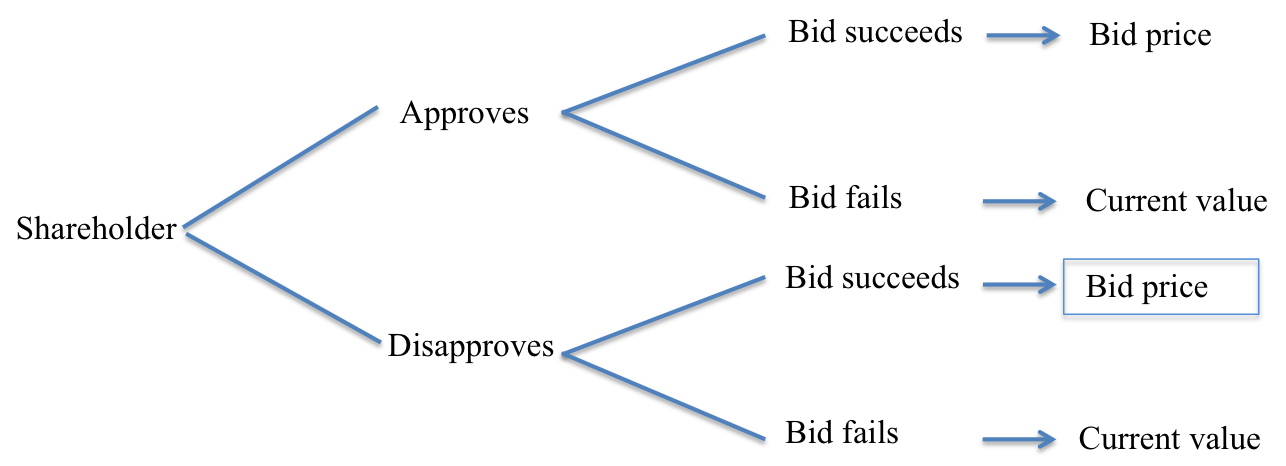
1. **Pressure to tender problem (Bebchuk).** Another problem regarding the market for corporate control that is raised by the law and economics literature is the “pressure to tender problem”, as described by Bebchuk.[[563]](#footnote-563) Bebchuk argues that the post-bid value of shares of minority shareholders will often be lower than the bid price, due to reduced liquidity of the shares and the possibility for the controlling shareholder to extract private benefits from the company through self-dealing.[[564]](#footnote-564) Taking this into account, shareholders will reason that if they do not tender their shares and the bid nevertheless succeeds, they are left with minority shares with lesser value. Therefore, shareholders will tender their shares, even if they value the company higher than the bid price, if they estimate that the risk that the bid succeeds is high.

This means that the choice between tendering and non-tendering is distorted: instead of comparing the current value of the shares and the bid price, minority shareholders also have to take into account the post-bid value of their shares (cfr. the square in figure 9 below). This distorted choice of shareholders is economically inefficient, as it allows value-decreasing takeovers to succeed. Moreover, the “pressure to tender” is unfair, as it allows an unequal treatment of tendering and non-tendering shareholders.

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*Figure 9. The pressure to tender problem described by Bebchuk.*

1. **Solution: “vote-like mechanism”.** To solve the pressure to tender problem, Bebchuk proposes to introduce a “vote-like mechanism” in takeover law.[[565]](#footnote-565) Under his proposal, a bidder would only be able to acquire shares in a takeover bid if the bid is approved by a majority of the disinterested shareholders (*i.e.* excluding the shares of the bidder). Shareholders would be able to indicate whether they approve the bid or not in their tender forms. This indication of approval would be separated from the possibility to indicate whether or not they want to tender their shares if the bid succeeds. This rule would allow shareholders to make the decision of whether or not they approve only on the basis of their valuation of the company as compared to the bid price (cfr. figure 10), which satisfies the criterion of efficiency that was proposed above.



*Figure 10. The pressure to tender problem solved by the vote-like mechanism of Bebchuk*

This solution of the vote-like mechanism is not present at the moment under the law in the United States or Europe.[[566]](#footnote-566)

1. **Critique by Schwarz.** Schwarz puts the existence of the pressure to tender problem into doubt, however.[[567]](#footnote-567) He argues that shareholders will recognize which outcome is most efficient and that this outcome is a “focal point”. Therefore, shareholders will not tender if it in their best interest that the bid fails. However, Bebchuk disputes the fact that the focal point theory will always lead to the best outcome.[[568]](#footnote-568) One of the reasons for this is that shareholders differ in their valuation of the shares and do not know each other’s valuation. Consequently, they do not know whether other shareholders consider the bid as sufficient or not.

The concluding lesson from this debate is that if the bid is clearly insufficient, a shareholder will probably predict that other shareholders will not tender and there will be not a pressure to tender. However, if it is unclear whether the bid is high enough for the majority of shareholders, there will probably be a pressure to tender for the shareholders. Therefore, the pressure to tender remains of concern.

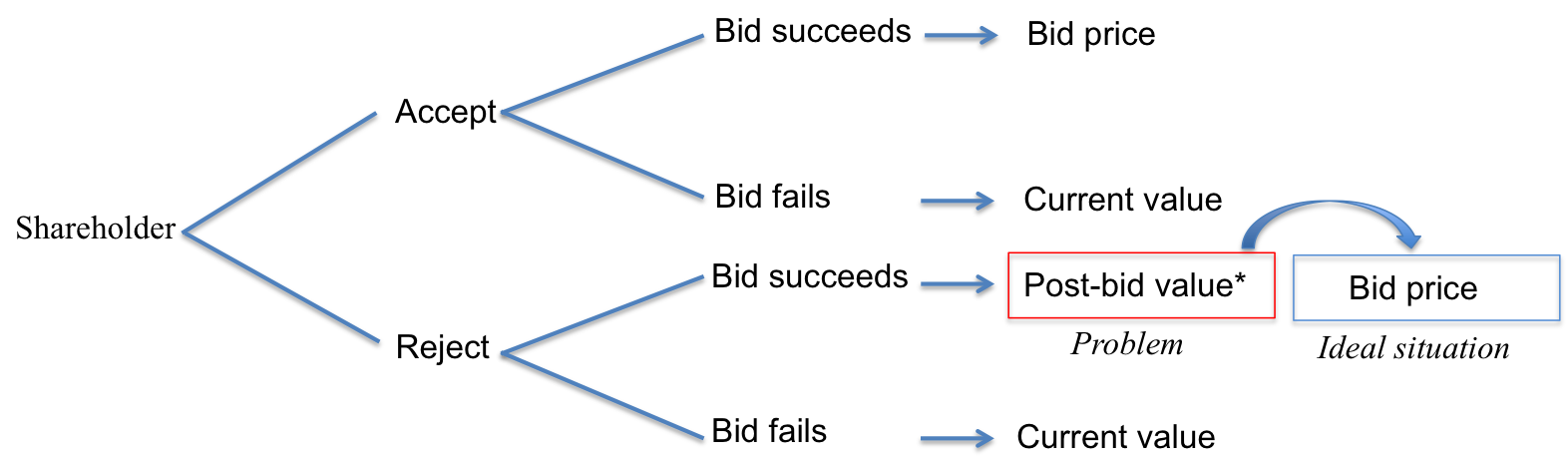
1. **Reception in the Takeover Directive.** Even though the EU did not introduce the vote-like mechanism that Bebchuk proposes, it does recognize the pressure to tender problem and has introduced a sell-out right after a takeover bid (article 16 Takeover Directive – see above in paragraph 138), which also addresses the pressure to tender problem.[[569]](#footnote-569) Such a sell-out right eliminates the pressure to tender to some extent: the shareholder who considers the bid too low can reject the bid, knowing that he can sell his shares anyway if the bid succeeds.[[570]](#footnote-570)
2. **Critique on the European sell-out right.** However, the current sell-out right is not sufficient as a solution, as the threshold of 90-95% is too high.[[571]](#footnote-571) Indeed, a bidder who acquires more than 75% (but less than the sell-out threshold) can push through almost all decisions in the company, while the minority shareholders have no exit possibility and are left with lower value minority shares.

Burkart and Panunzi have proposed to lower the threshold for the sell-out right to 50%. [[572]](#footnote-572) Assuming that the bidder needs at least 50% of the shares to acquire full control of the company, putting the threshold of the sell-out right at 50% eliminates the pressure to tender, as the minority shareholders can exit if the bid succeeds.

However, this solution is not perfect either. Indeed, this rule would distort the choice of shareholders against bidders. Under such a rule, minority shareholders would have an incentive not to tender their shares and try to free ride on the profits of the bidder, knowing that they can exercise their sell-out right if need be (see above in part 8.2 on the free rider problem).[[573]](#footnote-573) This could cause value increasing takeovers to fail. This is especially true since freeze-outs are not generally available at a percentage of share ownership lower than 90-95% (cfr. above in chapter 4). Therefore, Bebchuk sticks with the solution of a vote-like mechanism (see above in paragraph 235), although coupled with a possibility of freeze-outs and sell-outs at a threshold of 50%.[[574]](#footnote-574)

1. **Free rider problem vs. pressure to tender problem (Bebchuk & Hart).** At first glance, the free rider problem and the pressure to tender problem seem two opposite problems. Indeed, the latter assumes that the post-bid value will be lower than the pre-bid market value, while the former assumes that the post-bid value will be higher. In this regard, the Takeover Bid Assessment Report has stated that there is a trade-off between the pressure to tender problem and the free rider problem.[[575]](#footnote-575)

However, Bebchuk and Hart have shown that the pressure to tender problem and the free rider problem are not really each other’s opposite, but rather two symptoms of an underlying problem: the fact that shareholders have to take into account the post-bid value of their shares, rather than comparing only their valuation of the shares and the bid price (see figure 11 below).[[576]](#footnote-576) This conflicts with the sole owner standard discussed above in paragraph 228.



\* if post-bid value > current value: freerider problem (Grossman-Hart);

\* if post-bid value < current value: pressure to tender problem (Bebchuk).

*Figure 11. The free rider problem vs. the pressure to tender problem.*

We have already discussed above the solution that Bebchuk and Hart propose for these two problems: approval of takeovers by a majority of the shareholders to solve the pressure to tender problem (see above in paragraph 235) and freeze-outs at the bid price when the bidder has acquired a majority of the shares to solve the free rider problem (see above in paragraph 232).[[577]](#footnote-577)

## Holdout problem

1. **Holdout problem.** A third problem in the market for corporate control that is mentioned by the law and economics literature is the holdout problem. This problem involves shareholders trying to hold on to their shares in order to extract a higher portion of the value created by the bidder.
2. **Holdouts vs. freeriders.** This problem is similar to the free rider problem, but according to Cohen should be distinguished from it, even though this is not always done in the literature.[[578]](#footnote-578) While the holdout problem is based on the fact that the bidder gains economies of scale from acquiring all shares and the minority shareholders try to capture part of this gain (even though they actually prefer selling their shares), the free rider problems involves shareholders that do not want to sell their shares, but want to free ride on the positive externalities (increased profits) that are generated by the bidder.

Therefore, the fundamental difference is that the holdout does not want to be stuck with his shares, as he assumes that they would have a lower post-bid value (like in the pressure to tender problem). A free rider, on the other hand, precisely wants to be stuck with minority shares after a successful bid, as he assumes that the post-bid value will be higher, so that he can free ride on this increase in value. The similarity between both problems is that both holdouts and free riders want the bid to succeed, but have an incentive not to tender their shares. This could ultimately lead to the failure of the bid, which is not in their collective interest.

1. **Solution: freeze-outs.** As is the case for the free rider problem, the solution to the holdout problem is the possibility for a freeze-out at a sufficiently low threshold.[[579]](#footnote-579) Indeed, if the threshold is set too high, for example at 95% as in Belgium and the Netherlands (cfr. paragraphs 133 and 135), a minority shareholder only needs to acquire slightly more than 5% of the shares to become a holdout and block the freeze-out, in order to demand a higher compensation. As for the free rider problem, a freeze-out at a threshold of 50% of the disinterested shareholders makes more sense from an economic perspective, as a majority of the disinterested shareholders is more likely to be right than a minority (see above in paragraph 233).[[580]](#footnote-580)

## Building blocks for an efficient freeze-out regime

### Post-acquisition freeze-outs

1. **Three collective action problems**. The law and economics literature on the market for corporate control raises three collective action problems: the pressure to tender problem, the free rider problem and the holdout problem. From the literature described above, it is clear that freeze-outs play an important role in solving these problems, as does the sell-out right and shareholder approval of takeovers. In the paragraphs below, we discuss the building blocks for an efficient freeze-out regime, based on the theoretical framework discussed in the previous parts.
2. **Necessity of post-acquisition freeze-outs.** A first finding of the law and economics literature is that the possibility of post-acquisition freeze-outs is needed to solve the holdout problem and the free rider problem (see above in paragraphs 232 and 242). Indeed, without the possibility for post-acquisition freeze-outs, minority shareholders would have an incentive to free ride or hold out, leading to the failure of the bid even if it is value increasing. The presence of freeze-outs takes away this incentive.
3. **The right threshold.** An important question is: at which threshold of share ownership should freeze-outs be possible? Currently the threshold is 50% in the United States and 90-95% in Europe, except in the Netherlands, where alternative freeze-out techniques are possible at a lower threshold.[[581]](#footnote-581) The answer to this question is rather complex.

According to the sole owner standard, takeovers should succeed if they are value increasing (see paragraph 228). In addition, if a takeover succeeds, post-acquisition freeze-outs should be possible to overcome the free rider problem and the holdout problem (see paragraph 244). A takeover is considered as value increasing if the bidder values the company more than its existing shareholders. However, as shareholders may have different valuations of the company, we need to take a certain percentage of the shares to determine the success of a takeover. As noted above in paragraphs 233 and 242, the majority is more likely to be right than the minority, which suggests a threshold of 50% of the shares (excluding shares of the bidder and its affiliates) as the appropriate threshold. Setting the threshold higher would imply that the bidder would have to offer a higher price to attract more shares. This would be less efficient, since value increasing takeovers would be deterred.

1. **Feasibility of a lower threshold in the EU.** Lowering the threshold in one big sweep from 90-95% to 50% might not be acceptable in Europe, however. Even though 50% is economically more efficient, it will lead to lower takeover premia for minority shareholders. Indeed, bidders will only have to set the bid price high enough to reach 50% of the shares, after which they can freeze out the rest of the shareholders at the same price. This might be perceived as unfair and hence might be politically unacceptable. In addition, this might be considered as infringing too much on the property rights of the minority shareholders. Nevertheless, we have argued above that freeze-outs at a lower threshold do not violate article 1 FP ECHR, as they can be justified in the public interest and provide minority shareholders with a fair compensation (see paragraph 153). Finally, it would require a shift in the view on shareholders: from an owner of property rights to an investor who is mainly interested in the financial value of his investment (see above in paragraph 211). As Geens has argued, this evolution is already occurring in Europe due to the influence of financial law on corporate law.[[582]](#footnote-582) While the debate on the view on shareholders falls largely outside the scope of this master thesis, we believe that the view of a shareholder as an investor is the most appropriate one for small shareholders in listed companies, at least in the context of freeze-outs.

A compromise could be found by setting the threshold somewhere in between the high threshold in Europe and the low threshold in the United States. While this is of course to some extent arbitrary, the threshold could be set at for example 75%, which is the majority required for most fundamental reorganizations (such as mergers and amendments to the articles of association) in Belgium and other EU countries. Nevertheless, more academic debate on the threshold for freeze-outs is needed.

1. **Implementing a lower threshold in the EU.** There are two routes to lowering the threshold for freeze-outs in the European Union. First, the Takeover Directive could be amended to allow post-takeover squeeze-outs at a lower threshold. However, it might prove to be practically difficult to reach agreement between the member states on such an amendment. Alternatively, member states could allow mergers to be used to freeze out minority shareholders, ideally also with cash as consideration. The Merger Directive allows member states to introduce cash mergers, but this will lead to a loss of the advantage of fiscal neutrality (see paragraph 124).[[583]](#footnote-583) Discussing these tax consequences fals outside the scope of this master thesis, however.

Both routes functionally lead to the same result, the possibility of freeze-outs, but through a different transactional structure. Amending the Takeover Directive has as an advantage that a *sui generis* procedure for freeze-outs can be developed, with customized procedural safeguards to protect minority shareholders. The cash merger freeze-out option, on the other hand, requires that additional procedural safeguards are developed to protect minority shareholders if these cash mergers are used to freeze out minority shareholders. In the United States, these safeguards were developed by the Delaware courts using the fiduciary duties of directors, but from the different role of the courts in Europe follows that these safeguards should probably be adopted by the legislator in Europe (cfr. above in paragraph 216 and see further in paragraph 256).

Perhaps the best option would be to provide both the squeeze-out route as well as the cash merger route for freeze-outs, as this gives the most flexibility to practitioners in choosing the appropriate transaction structure. However, in such case, it would be very important to ensure that the procedural safeguards for minority shareholders in both transaction structures are equally protective to avoid transactional arbitrage by practitioners.

1. **The Dutch evolution of alternative freeze-out techniques.** The case law in the Netherlands that allows mergers and other techniques to be used to freeze out minority shareholders should be encouraged, as it is economically efficient to allow freeze-outs at a lower threshold (see above in paragraph 245). In addition, this case law should also be transplanted to other European countries.

However, some changes should be made. Most importantly, the requirement of “other business reasons” should be abandoned (see above in paragraphs 179 and 220). Indeed, it is economically efficient to allow mergers to be used for the mere purpose of freezing out minority shareholders. In addition, the unavailability of cash mergers, while not making freeze-out mergers impossible, complicates the transaction structure. Therefore, we would suggest to the national legislators to allow cash mergers, in order to eliminate this complexity (see above in paragraph 220).[[584]](#footnote-584) This would not be very disadvantageous for minority shareholders, as they are primarily interested in the financial value of their shares rather than ownership the shares *per se*.[[585]](#footnote-585) Finally, a remedy like the American appraisal remedy should be introduced, as the focus should be on the amount of compensation in the freeze-out, and not on the validity of the freeze-out (see above in paragraph 221).

1. **Freeze-out price.** Apart from the threshold, the determination of the price at which the minority shareholders are frozen out is also very important. The model of Amihud, Kahan and Sundaram discussed in paragraph 232 teaches us that the freeze-out price should be set at the bid price, unless the bid price is lower than the pre-bid market price, which serves as a minimum bound on the freeze-out price. This is currently the law in the United States (see paragraph 232). Also in the European Union, the bid price is presumed to be a fair freeze-out price, but the threshold for this (90% of shares included in the bid) is too high (see above in paragraph 212).[[586]](#footnote-586) An acceptance of a simple majority of the minority should be sufficient to establish a presumption that the bid price is a fair price, as is the case in the United States. As we have argued above in paragraph 245, the majority is more likely to be right than the minority.

Offering a higher price in the post-acquisition freeze-out than in the preceding takeover bid would violate the prohibition for the bidder to acquire shares at a higher price than offered in the takeover bid (see article 45 of the Takeover Decree and the principle of equal treatment in article 3(1)(a) of the Takeover Directive).[[587]](#footnote-587) On the other hand, if the bidder would offer a lower price in the post-acquisition freeze-out than in the preceding takeover bid, there can be no presumption of a fair price. Hence, the financial supervisor and ultimately the courts would have to review the freeze-out price strictly and only allow a lower freeze-out price if this is justified by exceptional circumstances occurring after the takeover bid.

1. **Eliminating the pressure to tender.** An important assumption behind a presumption of a fair price if the bid is accepted by a majority of the minority, is that the shareholders accepted the takeover bid because they believed it was fair, and not because of a pressure to tender (see above in part 8.3). Therefore, when discussing an efficient regime for freeze-outs, we cannot refrain from talking about measures that solve the pressure to tender problem. However, as this falls outside the strict scope of this master thesis, we will not discuss this in detail. We will only suggest that the possibility of freeze-outs is coupled with the solutions proposed by the law and economics literature: approval by a majority of the disinterested shareholders as a condition for the success of a takeover bid, in combination with a sell-out right at a threshold of 50% of the shares (see above in paragraphs 235 and 238).
2. **Procedural safeguards: post-acquisition freeze-outs.** Finally, an insight from Brudney and Chirelstein is that additional procedural safeguards, for example like approval of the freeze-out by independent directors or by a court, are not necessary for post-acquisition freeze-outs. Indeed, post-acquisition freeze-outs are merely the second step of an independent transaction if certain conditions are fulfilled.[[588]](#footnote-588) These conditions are that the freeze-out must be effected promptly after the takeover bid and at the same price, and that the takeover bid should be accepted by a majority of the shares included in the bid (see above in paragraph 114).[[589]](#footnote-589)

As discussed in part 3.6, the law in the United States is already in line with this insight. However, we have pointed out in paragraphs 181 and 222 that this is currently not the case in the case law on alternative freeze-out techniques in the Netherlands. For example, the *Versatel II* case law required the presence of independent directors in a post-acquisition freeze-out. Nevertheless, this seems to be changing due to the practice of pre-cooked freeze-out transactions (see above in paragraphs 192 and 222), which is more efficient from an economic perspective.

### Going private freeze-outs

1. **Going private freeze-outs.** So far, we have been discussing post-acquisition freeze-outs in this chapter. Indeed, the strongest economic argument for allowing freeze-outs is that they solve the free rider problem and the holdout problem after a takeover bid by an independent party. In contrast, going private freeze-outs concern a situation where the majority shareholder has had control over the company for some time, but now wants to take it private. This raises an additional risk of self-dealing by the majority shareholder, as the freeze-out price is not determined by independent bargaining and market forces, but by the controlling shareholder. For this reason, Brudney and Chirelstein have even argued in favour of a prohibition of going private freeze-outs in the past.[[590]](#footnote-590) However, the law in both the United States and in Europe takes a different view and allows going-private freeze-outs (the United States more flexibly than Europe), and this is not contested in the current literature.
2. **Desirability of going private freeze-outs.** The main rationale for allowing going private freeze-outs is that they allow a company to be run more efficiently and avoid the costs associated with a listing (see above in paragraph 4).[[591]](#footnote-591) In addition, there is again a risk of a holdout problem in a going-private situation: a minority shareholder might not want to approve a going-private freeze-out, even if the freeze-out price is higher than his valuation of his shares, because he might want to extract a higher price from the majority shareholder.[[592]](#footnote-592) Indeed, the minority shareholder can be aware of his “nuisance value” and might even try to enlarge it, for example by filing legal proceedings against the freeze-out or other company decisions.[[593]](#footnote-593) Hence, freeze-outs at a sufficiently low threshold are also economically efficient for going private freeze-outs.

However, this problem is less related to the efficiency of the market for corporate control and is not specifically discussed in the literature on going private freeze-outs. Therefore, the arguments for going private freeze-outs are weaker than for post-acquisition freeze-outs. Nevertheless, we would argue to use the same threshold for both types of freeze-outs. Deciding otherwise would lead to the strange situation where a freeze-out is possible only immediately after a takeover bid, but no longer if some time has passed, which could create an undue pressure on a bidder to engage in a post-acquition freeze-out.

1. **Procedural safeguards.** Nevertheless, additional procedural safeguards are needed in the case of going private freeze-outs, in order to eliminate the self-dealing nature of these transactions and simulate an at arm’s length process. It has been convincingly argued by authors in the United States that one-step and two-step going private freeze-outs should be treated the same with regards to the procedural safeguards (see above in part 3.5.4),[[594]](#footnote-594) and we will also proceed under this assumption.
2. **Procedural safeguards: internal actors vs. external actors.** In chapter 7, we have noted that the United States rely on internal actors (independent directors and a majority of the minority shareholders) to protect minority shareholders, while Europe places its trust in external actors, such as courts, financial supervisors and independent experts. This raises the question of which approach is the most efficient.

Subramanian has convincingly argued in favour of the American approach, based on an “arms-length approach” to freeze-outs (see also above in paragraph 100).[[595]](#footnote-595) In essence, he argues that the approach to conflicted transactions, such as freeze-outs, should mimick the process of independent transactions. To succeed, mergers and tender offers by an independent party have to be approved by the shareholders and by the board[[596]](#footnote-596), and are reviewed by the courts under the lenient business judgment rule. Consequently, Subramanian has argued that freeze-outs should also be approved by the board and by the shareholders. However, because the majority shareholder controls the board and a majority of the shares, we have to rely on approval by a special committee of independent directors and by a majority of the minority shareholders instead (cfr. above on *Getty Oil* and *Kahn* in paragraphs 84 and 85). Each of these procedural safeguards fulfils a different function: while the independent directors act as a bargaining agent for the shareholders, the approval by the majority of the minority serves as a “market check”.[[597]](#footnote-597) If both these procedural safeguards are followed, the freeze-out meets the arms-length standard and hence should be reviewed under the business judgment rule. This is also the solution adopted by the most recent case law in Delaware (see above in part 3.5.5).

We argue that freeze-outs in Europe should adopt a similar approach to the procedural protection of minority shareholders as exists in the United States, relying on internal actors. This approach most closely mimicks an arms-length transactions and can be considered most efficient. High costs of litigation can be avoided in the American approach, as suits by minority shareholders against the freeze-out are unlikely to succeed, due to the deference of the courts to the business judgment rule. In addition, it is difficult for external actors such as courts and the financial supervisor to step in to review the freeze-out price. It seems a better idea to leave this to the internal actors, like independent directors and minority shareholders, who have an interest in taking informed decisions.

Therefore, we propose that going-private freeze-outs should be possible at a lower threshold, but with more procedural protections for minority shareholders: they should be approved by a special committee of independent directors and by a majority of the minority shareholders, like under current Delaware law (see above in part 3.5.5). If these conditions are fulfilled, courts should be reluctant to step in to annul the freeze-out or to order a higher freeze-out price, similar to review under the American business judgment rule. On the other hand, if these conditions are not fulfilled, courts should strictly review the freeze-out and the freeze-out price, like the Delaware courts do under the entire fairness test.[[598]](#footnote-598)

1. **Procedural safeguards: standards vs. rules.** The question arises how we should implement the procedural safeguards discussed above: through statutory rules as in Europe, or through standards to be applied by the courts as in the United States (see the comparison above in paragraph 214)? In this discussion, the following argument is important: the costs of developing a rule are incurred *ex ante* when drafting the legislation, while the costs of a standard are incurred *ex post* when it is applied to a specific situation. Therefore, which is more efficient depends on the situation: how frequent will it be applied, and how much variation is there in the situations to which it will be applied?[[599]](#footnote-599)

However, as we noted above in paragraph 216, while standards are transposed into concrete rules by the Delaware courts, it is doubtful that this would occur to the same extent in Europe. Therefore, we argue that in Europe, the procedural safeguards should be established through rules developed by the legislator. Of course, the legislator could be inspired by the case law of the Delaware courts. In addition, it is unlikely that the overhaul in the approach to freeze-outs which we have suggested in the paragraphs above could be realised through the courts. Indeed, this is a task for the legislator.

# Concluding chapter

1. **United States.** From chapter 3, we can conclude that the United States have a well-developed and quite flexible legal framework for freeze-outs. Cash mergers are the preferred freeze-out technique, available at a threshold of 50% of the outstanding shares. Post-acquisition freeze-outs are allowed if they are performed at the same price as and promply after an independent takeover bid accepted by a majority of the shareholders. Going private freeze-outs enjoy the lenient standard of the business judgment rule, provided that they are approved by a special committee of independent directors and by a majority of the minority shareholders.
2. **Europe.** On the other hand, chapter 4 has taught us that the regime on freeze-outs in Europe is significantly less flexible. Cash mergers mergers are generally not available in Europe. Instead, the European Union has harmonized post-takeover squeeze-outs in the Takeover Directive, which are available at a threshold of 90-95% through Europe. In addition, stand-alone squeeze-outs outside any takeover bid are available in most countries at a similar threshold.
3. **Comparison of the threshold.** The significant difference in threshold between the United States and Europe (50 vs. 90-95%) was explained in chapter 7 by the different view on shareholders: while in the United States, a shareholder is regarded as an investor with a purely financial interest in the company, European countries look at a shareholder as a holder of property rights.
4. **Lowering the threshold.** From the economic analysis in chapter 8 appeared that freeze-outs should be available at a threshold of 50% from the perspective of economic efficiency. Indeed, freeze-outs can solve the free rider problem and the holdout problem in the market for corporate control. In addition, freeze-outs can facilitate that companies are run more efficiently, without the costs of a listing and of minority shareholders. However, as the jump from 90-95% to 50% might be politically difficult to digest in Europe, especially considering the view of a shareholder as an owner of property rights, it might also be an option to lower the threshold first to 75% (the threshold for changes to the articles of association in many member states, such as Belgium), as an intermediary step.
5. **Solving the pressure to tender problem.** However, there is also a pressure to tender problem in the market for corporate control (see part 8.3), which pressures minority shareholders in tendering their shares even if they consider the bid too low. Although this is not directly related to the topic of this master thesis, solving this problem is a necessary condition for an efficient functioning of the takeover bids, and therefore also relevant for freeze-outs, since (especially post-acquisition) freeze-outs rely on the preceding takeover bid to determine the freeze-out price. Therefore, we suggest that the solutions mentioned in the law and economics literature are adopted: a sell-out right at a threshold of 50% of the shares and a vote-like mechanism, as proposed by Bebchuk. However, further research is needed on the implementation of these solutions.
6. **Violation of article 1 FP ECHR?** The lower threshold for freeze-outs that we propose in this master thesis should not be considered as a violation of the right to property under article 1 FP ECHR (see part 4.5). It is justified in the public interest, because it enhances the economic efficiency of the market for corporate control, which benefits all shareholders (majority and minority). In addition, mechanisms can be and should be put in place to ensure that the frozen out minority shareholders are fairly compensated.
7. **Option 1: lower threshold for squeeze-outs.** To lower the threshold, the European legislator could amend the Takeover Directive to lower the threshold for post-takeover squeeze-outs. In addition, national legislators are free to lower the threshold for stand-alone squeeze-outs as well. The advantage of this approach is that the squeeze-out procedure is a *sui generis* technique, where the procedural safeguards for minority shareholders can be customized specifically for an efficient freeze-out regime. However, it might be difficult to reach a sufficiently large majority between the member states on this issue.
8. **Option 2: allowing freeze-out mergers.** Another option would be that national courts and legislators allow general corporate law techniques, such as mergers and de facto mergers, to be used to freeze out minority shareholders. Indeed, these techniques are usually available at a lower threshold than squeeze-outs. For this option, additional procedural safeguards would have to be developed (by the courts or by the legislator) to protect the interests of minority shareholders when these techniques are used as freeze-outs.

These two options could also both be made available as a freeze-out technique in order to maximize transactional flexibility, with similar protection for minority shareholder to avoid transactional arbitrage,

1. **Dutch case law on alternative freeze-out techniques.** As discussed in chapter 5, case law in the Netherlands has already allowed alternative freeze-out techniques under certain conditions. This evolution should be welcomed, as it lowers the threshold and leads to a more flexible and efficient freeze-out regime. However, some changes should be made to the Dutch case law. First, the requirement of “other business reasons” (cfr. *Versatel I*) should be abandoned as a condition for the validity of alternative freeze-out techniques, as was done with the business purpose test of *Singer* in the United States. In addition, for post-acquisition freeze-outs the additional requirement of independent directors and the review of the fair price by the courts (cfr. *Versatel II*) should also be abolished, as a post-acquisition freeze-out is merely the second step of an independent takeover bid if effected promptly after an independent takeover bid and at the same price. In conclusion, Dutch law is still at an early stage of the evolution towards an efficient freeze-out regime. This is similar to the historical evolution in the United States, where freeze-out mergers were also first viewed with suspicion, while they are now accepted if sufficient procedural safeguards are in place (see above in part 3.2 on the historical evolution of freeze-outs in the United States).
2. **Transplanted to other European countries.** This Dutch case law on alternative freeze-out techniques should be transplanted to other European countries as well, taking into account the critique formulated in the previous paragraph. For Belgium, this should be possible under a flexible interpretation of the abuse of majority doctrine, although previous case law (in a different context) has been reluctant to accept this (see chapter 6). We assume that a similar transplantation will also be possible in other European countries, but this has not yet been tested.
3. **Absence of cash mergers.** The national legislators should also allow cash mergers for listed companies. This would give more flexibility in structuring merger transactions in general, and would allow for easier freeze-outs at a lower threshold, which is economically efficient. Currently, the unavailability of cash mergers can already be circumvented through the dilutive effect of a stock merger or through a “de facto merger”. Nevertheless, allowing cash mergers would reduce the complexity of freeze-out transactions, and hence should be recommended. Cash mergers are not prohibited under the Merger Directive, although the Merger Directive does not completely apply to such transactions (see above in paragraph 124).
4. **Appraisal remedy.** The national legislator should also introduce a remedy like the American appraisal remedy. Indeed, the focus should be on the amount of compensation in the freeze-out, and not on the validity of the freeze-out *per se*. This relates to the idea of the shareholders as an investor, with no absolute right to remain a shareholder, but a right to the fair value of his investment.
5. **Conceptual distinction: post-acquisition vs. going private freeze-outs.** Both in the United States and in Europe, post-acquisition freeze-outs are treated more flexibly than going private freeze-outs. This also makes sense from an economic perspective, as the first are part of an at arm’s length transaction, while the latter are a form of self-dealing.

It follows that post-acquisition freeze-outs should be allowed if they are performed at the same price as and promply after an independent takeover bid accepted by a majority of the shareholders, like in the United States. The European Union follows a similar approach, but the threshold for the presumption of a fair price is too high and should be lowered from 90% to 50% of the shares included in the bid.

1. **Going private freeze-outs: procedural safeguards.** For going private freeze-outs additional procedural safeguards should be required to eliminate the presence of self-dealing. Again, the American approach to this issue, which was defended by Subramanian and which relies on the use of internal actors, seems the most efficient: if an arms-length approach is mimicked through approval of the freeze-out by a special committee of independent directors and by a majority of the minority shareholders, the lenient business judgment rule applies; if not, the more stringent entire fairness test applies. In our view, this is more efficient than protection through external actors, as in the European Union. However, due to the different societal and legal context, these procedural safeguards will have to be established through statutory rules instead of through standards applied by the courts.
2. **Conclusion.** In conclusion, this master thesis has done a comparitive and economic analysis of the different freeze-out regimes in the United States, the European Union, Belgium and the Netherlands. From this, we concluded that especially the American system is well developed and economically efficient, and have suggested some changes to the European system, taking into account the differences in societal and legal context. With the insights from this research, we hope to spark a debate among European legal scholars on freeze-outs. In addition, we have addressed the European and national legislators, as well as the national courts, to consider some changes to the law on freeze-outs. We hope to have convinced them with the arguments set out in this master thesis.
3. **Further research.** Finally, there are some issues that could not be fully tackled in this master thesis. First, more research is needed on pressure tender problem and how to solve it in a European context. Some basic points have already been discussed in this master thesis, but a more extensive research is warranted.[[600]](#footnote-600)

Second, this master thesis has not addressed freeze-outs in private (non-listed) companies. The question arises whether freeze-outs should also be possible there and whether there should be any differences with freeze-outs in listed companies. The context is different, as shareholders of private companies are no pure financial investors and often involved in the management of the company. In addition, the concept of freeze-outs could possibly conflict with the *“geschillenregeling”* (dispute settlement procedure), which follows another logic based on the resolution of conflicts between shareholders.

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Court of Commerce Brussels 5 March 1929, *RPS* 1929, 186.

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1. *“Een waterdruppel holt een steen niet uit door kracht, maar door vaak te vallen”* (Ovidius). [↑](#footnote-ref-1)
2. Both terms are used interchangeably, but mean the same in the context of the present master thesis [↑](#footnote-ref-2)
3. Own translation from the Dutch original text: *“Onder ‘controle’ over een vennootschap moet worden verstaan, de bevoegdheid in rechte of in feite om een beslissende invloed uit te oefenen op de aanstelling van de meerderheid van bestuurders of zaakvoerders of op de oriëntatie van het beleid.”* [↑](#footnote-ref-3)
4. M. Raaijmakers, “Uitstoting minderheid na gestanddoening van een openbaar overnamebod: inspiratie uit Nederland?” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, 377-410 (hereinafter ‘M. Raaijmakers, “Uitstoting minderheid”); M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 851; E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 207. [↑](#footnote-ref-4)
5. For an overview of the various reasons, please refer to: Asser/Maeijer 2-II\*, 2009, nr. 677; P.P. de Vries, “Exit voor minderheidsaandeelhouders: uitkoop en alternatieven”, *O&F* 2004, (39) 40; M. Raaijmakers, “Uitstoting minderheid”, 381-382, footnote 15; L. Scheepbouwer, “Post-closing herstructurering: goede ideeën beginnen met goede koffie”, *V&O* 2013, n° 12, (204) 204-205; P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 137; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 9; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 847-850; E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 185; The High Level Group of Company Law Experts, *Report on issues related to takeover* bids, 10 January 2012, available at <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>, 60-61 (hereinafter “Winter Report”); Marccus Partners (eds.), *The Takeover Bids Directive Assessment Report*, 2011, available at <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>, 315 (hereinafter “TOBD Assessment Report”). [↑](#footnote-ref-5)
6. For this term, see M. Raaijmakers, “Uitstoting minderheid”, 378 and 380-381. [↑](#footnote-ref-6)
7. P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 854. [↑](#footnote-ref-7)
8. S. Mampaey, “Plat beurseinde voor bruisende vennootschap”, *De Tijd*, 14 November 2015, [↑](#footnote-ref-8)
9. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, 841-917. [↑](#footnote-ref-9)
10. E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 202-203. [↑](#footnote-ref-10)
11. For example: Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, 1325-1344; Cohen, L., “Holdouts and free riders”, *The Journal of Legal Studies* 1991, 351-362. [↑](#footnote-ref-11)
12. Cfr. K. Geens, “Helpt ‘good corporate governance’? Over regels voor behoorlijk bestuur in vennootschappen” in P. D’Hoine and B. Pattyn (eds.), *Over grenzen en generaties heen. Lessen voor de eenentwintigste eeuw,* Leuven, Leuven Universitaire Pers, 2012, (73) 82-84. [↑](#footnote-ref-12)
13. Some authors have nevertheless applied insights from law and economics to the European framework on freeze-outs. However, this research is still rather limited and uncritical towards the European system, and it does not compare with the law in the United States. See: M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 30 p.; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 57 p. [↑](#footnote-ref-13)
14. Cfr. M. Heene, *Squeeze-out (uitkoopbod)*, Mechelen, Kluwer, 2012, 10; V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1356, footnote 9; P.P. de Vries, “Exit voor minderheidsaandeelhouders: uitkoop en alternatieven”, *O&F* 2004, (39) 39. [↑](#footnote-ref-14)
15. Cfr. Belgisch Centrum van het Vennootschapsrecht (ed.), *De modernisering van het vennootschapsrecht: op initiatief van het Belgisch Centrum van het vennootschapsrecht*, Brussels, Larcier, 2014, 446. p. [↑](#footnote-ref-15)
16. U. Mattei, *Comparative law and economics*, Ann Arbor, The University of Michigan Press, 1997, 266 p.; U. Mattei, L. Antoniolli and A. Rossato, “Comparative law and economics” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, 505-538; R. Michaels, “The second wave of comparative law and economics?”, *University of Toronto Law Journal* 2009, 197-213; F. Faust, “Comparative law and economic analysis of law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 837-865. [↑](#footnote-ref-16)
17. See R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, 322 p. [↑](#footnote-ref-17)
18. R. Michaels, “The second wave of comparative law and economics?”, *University of Toronto Law Journal* 2009, (197) 198; U. Mattei, L. Antoniolli and A. Rossato, “Comparative law and economics” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, (505) 505; U. Mattei, *Comparative law and economics*, Ann Arbor, The University of Michigan Press, 1997, 6; J. Armour, H. Hansmann, R. Kraakman, “What is corporate law?” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (1) 4. [↑](#footnote-ref-18)
19. F. Faust, “Comparative law and economic analysis of law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (837) 845 and 849; U. Mattei, *Comparative law and economics*, Ann Arbor, The University of Michigan Press, 1997, ix-x. [↑](#footnote-ref-19)
20. R. Michaels, “The second wave of comparative law and economics?”, *University of Toronto Law Journal* 2009, (197) 197 and 210; U. Mattei, L. Antoniolli and A. Rossato, “Comparative law and economics” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, (505) 518; U. Mattei, *Comparative law and economics*, Ann Arbor, The University of Michigan Press, 1997, 27. [↑](#footnote-ref-20)
21. Directive European Parliament and Council nr 2004/25/EC, 21 April 2004 on  
    takeover bids, *O.J. L.* 20 April 2004, nr. 142, 12. [↑](#footnote-ref-21)
22. Third Council Directive nr. 78/855/EEC, 9 October 1978 based on article 54 (3) (g) of the treaty concerning mergers of public limited liability companies, *O.J. L.* 20 October 1978, nr. 295, 36. [↑](#footnote-ref-22)
23. R. Hirschl, “The question of case selection in comparative constitutional law”, *The American Journal of Comparative Law* 2005, (125) 139. [↑](#footnote-ref-23)
24. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 853; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 932, footnote 1. [↑](#footnote-ref-24)
25. R. Hirschl, “The question of case selection in comparative constitutional law”, *The American Journal of Comparative Law* 2005, (125) 133. [↑](#footnote-ref-25)
26. Cfr. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 900-902. [↑](#footnote-ref-26)
27. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 902. [↑](#footnote-ref-27)
28. K. Zweigert and H. Kötz, *Introduction to comparative law*, Oxford, Clarendon Press, 1998, 714 p. [↑](#footnote-ref-28)
29. For a critique on the functionalist method, see for example: R. Michaels, “The functional method of comparative law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 339-382; G. Frankenberg, “Critical comparisons: re-thinking comparative law”, *Harvard International Law Journal* 1985, 411-455. [↑](#footnote-ref-29)
30. K. Zweigert and H. Kötz, *Introduction to comparative law*, Oxford, Clarendon Press, 1998, 40. [↑](#footnote-ref-30)
31. See for example: R. Michaels, “The functional method of comparative law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (339) 369 and following. For an overview of this debate and a proposed reconciliation, see G. Danneman, “Comparative law: study of similarities of differences?” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, 383-419. [↑](#footnote-ref-31)
32. R. Michaels, “The functional method of comparative law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (339) 364. [↑](#footnote-ref-32)
33. J. Wouters, “Harmonisering van de regels betreffende openbare biedingen in de Europese Gemeenschap. Een transatlantisch perspectief op het voorstel voor een dertiende richtlijn (deel 1)”, *TRV* 1991, (3) 5 and following. [↑](#footnote-ref-33)
34. C. Van der Elst, *Aandeelhouderschap van beursgenoteerde vennootschappen: economisch-juridische analyse*, Brussels, Larcier, 2001, 397 p.;K. Geens, “Over corporate governance, aandeelhoudersstructuren en vennootschapsrecht” in Jan Ronse Instituut (ed.), *Knelpunten van dertig jaar vennootschapsrecht: op zoek naar oplossingen voor de 21e eeuw*, Kalmthout, Biblo, 1999, (735) 736 and following; P. Davies, L. Enriques, G. Hertig, K. Hopt and R. Kraakman, “Beyond the anatomy?” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (305) 306-307. [↑](#footnote-ref-34)
35. Cfr. J. Armour, H. Hansmann, R. Kraakman, “Agency problems and legal strategies” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (35) 47. [↑](#footnote-ref-35)
36. E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 223-224. [↑](#footnote-ref-36)
37. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912; K. Geens, “Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het ‘beginsel van de juiste prijs’” in X, *Synthèse de droit bancaire et financier. Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, 451-468. [↑](#footnote-ref-37)
38. R. Michaels, “The functional method of comparative law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (339) 373-376; F. Faust, “Comparative law and economic analysis of law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (837) 845. [↑](#footnote-ref-38)
39. See for example: J. Armour, H. Hansmann, R. Kraakman, “What is corporate law?” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (1) 28; F. Faust, “Comparative law and economic analysis of law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, (837) 843; H. Kerkmeester, “Methodology: general” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, (383) 386-387; R. Posner, “The value of wealth: a comment on Dworkin and Kronman”, *The Journal of Legal Studies* 1980, (243) 244.; R. Posner, *Economic analysis of law*, New York, Aspen Publishers, 2003, 13. [↑](#footnote-ref-39)
40. See inter alia: E.M. Fink, “Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics”, *Hastings Law Journal* 2004, (931) 932; R. Posner, “The law and economics movement”, *The American Economic Review* 1987, (1) 5; H. Kerkmeester, “Methodology: general” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, (383) 384 and following. [↑](#footnote-ref-40)
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42. U. Mattei, L. Antoniolli and A. Rossato, “Comparative law and economics” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000, (505) 512-513; L. Kaplow and S. Shavell, “Why the legal system is less efficient than the income tax in redistributing income”, *The Journal of Legal Studies* 1994, (557) 667-681; R. Posner, “Utilitarianism, economics and legal theory”, *The Journal of Legal Studies* 1979, 103-140; R. Posner, “The ethical and political basis of the efficiency norm in common law adjudication”, *Hofstra Law Review* 1980, 487-507.

    *Contra:* R. Dworkin, “Is wealth a value?”, *The Journal of Legal Studies* 1980, 191-226; R. Dworkin, “Why efficiency? A response to professors Calabresi and Posner”, *Hofstra Law Review* 1979-1980, (563) 568-569). [↑](#footnote-ref-42)
43. This classification is based on V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, 487-519. It should be noted, however, that the present paper has omitted a third type of freeze-outs that these authors distinguished. This third type concerned a merger between a parent company and a subsidiary that differs from the going private freeze-out because there are also operational synergies present. Nevertheless, this type was omitted for reasons of simplicity and because later literature on freeze-outs does not retain this category as a separate type of freeze-outs. [↑](#footnote-ref-43)
44. There is some loss of precision involved in using this term, as a two-step going private freeze-outs also occurs after a tender offer (this time by a controlling shareholder). Nevertheless, this term will be used for reasons of simplicity. [↑](#footnote-ref-44)
45. For the reasons why delisting a company and becoming its sole shareholder can be advantageous, see above in paragraph 4. [↑](#footnote-ref-45)
46. An at arm’s length transaction is a transaction between parties that are independent from another. [↑](#footnote-ref-46)
47. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 852 and following; S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 6-13; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 3. [↑](#footnote-ref-47)
48. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376. [↑](#footnote-ref-48)
49. E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, 487-519. [↑](#footnote-ref-49)
50. They even argued for a straight prohibition for going private freeze-outs. However, this is not the current state of the law in the United States (see further in chapter 3). [↑](#footnote-ref-50)
51. This overview is inspired mainly by the following publications: M. Raaijmakers, “Uitstoting minderheid”, 377-410; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 851; E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 207. [↑](#footnote-ref-51)
52. The reason that this example includes the use of an SPV, is that company B will merge into the bidder and we assume here that company A wants to hold company B as a subsidiary. [↑](#footnote-ref-52)
53. Article 2:333 Dutch Civil Code. [↑](#footnote-ref-53)
54. The reason that this example includes the use of an SPV is that company B will merge into the bidder and we assume here that company wants to hold company B as a subsidiary. [↑](#footnote-ref-54)
55. M. Raaijmakers, “Uitstoting minderheid”, 397. [↑](#footnote-ref-55)
56. Cfr. A.F.J.A. Leijten, “Tien jaar uitkoop- en geschillenregeling (deel 1)”, *Ondernemingsrecht 1999*, 204, nr. 3.3. [↑](#footnote-ref-56)
57. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 137; Asser/Maeijer 2-II\*, 2009, nr. 677; W.B. Kuijpers and A. van der Krans, “De positie van minderheidsaandeelhouders en het openbaar bod”, *O&F* 2014, (19) 24. [↑](#footnote-ref-57)
58. This exchange ratio is based on the ratio between the intrinsic value of the shares of each company: 1.000 / 10.000 = 1/10. It should be noted that company A, the majority shareholder does not receive new shares in return for its old shares in company B, but receives the assets and liabilities of company B. [↑](#footnote-ref-58)
59. 100.000 original shares + 2.000 new shares issued for the merger = 102.000 shares in total. [↑](#footnote-ref-59)
60. A. Haelterman, *Vennootschapsbelasting doorgelicht. Een inzichtelijk handboek*, Bruges, Die Keure, 2015, 286-287 and 310. [↑](#footnote-ref-60)
61. The reason that this example includes the use of an SPV is that company B will merge into the bidder and we assume here that company wants to hold company B as a subsidiary. [↑](#footnote-ref-61)
62. Cfr. rule 6905/1 Rule Book I - Harmonized Rulebook, *iuncto* rule A-2706/1 Rule Book II – General Regulations Euronext Amsterdam Stock Market, *iuncto* Announcement 2004-041 - policy concerning delisting. All documents are available at <https://www.euronext.com/nl/regulation/amsterdam>. See also: M. Raaijmakers, “Uitstoting minderheid”, 387-388. [↑](#footnote-ref-62)
63. Cfr. rule 6905/1 Rule Book I - Harmonized Rulebook, *iuncto* rule B-3401/1 and B-3401/2 Rule Book II – specifc regulations for Euronext Brussels. All documents are available at <https://www.euronext.com/nl/regulation/brussels>. [↑](#footnote-ref-63)
64. Cfr. S. Rousseau, “Transics zoekt uitgang Brusselse beurs”, *De Tijd*, 17 January 2013. [↑](#footnote-ref-64)
65. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 35. [↑](#footnote-ref-65)
66. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 853; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 932, footnote 1. Of course, this competition for corporate charters by Delaware is facilitated as the United States applies the “incorporation theory”, according to which the internal corporate affairs of a corporation are governed by the law of the state of incorporation. See F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 34 and following. [↑](#footnote-ref-66)
67. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 852 and following; S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 6-13; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 3. [↑](#footnote-ref-67)
68. Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977). [↑](#footnote-ref-68)
69. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, 624-692. [↑](#footnote-ref-69)
70. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 627-629. [↑](#footnote-ref-70)
71. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 629-631. [↑](#footnote-ref-71)
72. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 855; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 3; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 614. [↑](#footnote-ref-72)
73. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 632. [↑](#footnote-ref-73)
74. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 632-641. [↑](#footnote-ref-74)
75. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 641-653. [↑](#footnote-ref-75)
76. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 643-646 and 653. [↑](#footnote-ref-76)
77. Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977). See paragraph 77 for a more elaborate discussion of *Singer*. [↑](#footnote-ref-77)
78. Under the common law, controlling shareholders and directors of a company owe fiduciary duties towards the company. This concept is explained further in part 3.4. [↑](#footnote-ref-78)
79. The appraisal remedy grants dissenting shareholders the right to request the corporation to pay them the fair value of the shares in case of a fundamental reorganization of the corporation, such as a merger. This remedy is explained further in part 3.3. [↑](#footnote-ref-79)
80. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). [↑](#footnote-ref-80)
81. In some states, but not Delaware, appraisal remedies can even be used against other fundamental corporate transactions. See S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 193. [↑](#footnote-ref-81)
82. For a discussion of appraisal rights, see: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 855; S. M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 192-206; S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 68-83; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, 1-60; J. Seligman, “Reappraising the Appraisal Remedy”, *The George Washington Law Review* 1984, 829-871; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, 613-715. [↑](#footnote-ref-82)
83. A short-form merger is a simplified type of merger (without shareholder approval) between a parent company and a subsidiary, where the parent company owns more than 90% of the shares in its subsidiary. See section 253 of the Delaware General Corporation Law and paragraph 75 below. [↑](#footnote-ref-83)
84. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 855; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 3; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 614. [↑](#footnote-ref-84)
85. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 855; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 4,18 and 28; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 615. [↑](#footnote-ref-85)
86. The overview of disadvantages is based on the following authors: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 855-858; S. M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 222-223; R.J. Gilson, *The law and finance of corporate acquisitions,* New York, Foundation Press, 1986, 885-886; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 40-42; J. Seligman, “Reappraising the Appraisal Remedy”, *The George Washington Law Review* 1984, (829) 829-830; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, 613-715. [↑](#footnote-ref-86)
87. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 857-858. [↑](#footnote-ref-87)
88. B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 635-640. [↑](#footnote-ref-88)
89. There is quite some debate if minority discount should be taken into account in an appraisal remedy. See: B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 641 and following; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 38. In principle, the Delaware courts do not apply minority discounts. [↑](#footnote-ref-89)
90. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 680-683. [↑](#footnote-ref-90)
91. J. Cox, and T. Hazen, *Business organizations law*, St. Paul, West, 2011, 644; B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 627. [↑](#footnote-ref-91)
92. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 773-774. [↑](#footnote-ref-92)
93. B.M. Wertheimer, “The Shareholders' Appraisal Remedy and How Courts Determine Fair Value”, *Duke Law Journal* 1998, (613) 622; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 41. [↑](#footnote-ref-93)
94. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 772; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 858; R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 41; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 546-547; F. Stevelman, “Going Private at the Intersection of the Market and the Law”, *The Business Lawyer* 2007, (775) 813. [↑](#footnote-ref-94)
95. See for example: Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977). See also: R.B. Thompson, “Exit, majority and liquidity rule: appraisal’s role in corporate law”, *The Georgetown Law Journal* 1995, (1) 42-48. It should be noted that outside Delaware, the appraisal remedy is considered to be the exclusive remedy. [↑](#footnote-ref-95)
96. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 278. [↑](#footnote-ref-96)
97. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 278. [↑](#footnote-ref-97)
98. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 286; R.F. Balotti and J.J. Hanks, “Rejudging the Business Judgment Rule ”, *The Business Lawyer* 1993, (1337) 1342. [↑](#footnote-ref-98)
99. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 286; R.F. Balotti and J.J. Hanks, “Rejudging the Business Judgment Rule ”, *The Business Lawyer* 1993, (1337) 1339. It should be noted that the business judgment rule has not been codified and that there is quite some debate on its precise contents. [↑](#footnote-ref-99)
100. R.F. Balotti and J.J. Hanks, “Rejudging the Business Judgment Rule ”, *The Business Lawyer* 1993, (1337) 1339-1340; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 935, footnote 10. [↑](#footnote-ref-100)
101. Aronson v. Lewis, 473 A.2d 805 (Del. 1984), 812. [↑](#footnote-ref-101)
102. R.F. Balotti and J.J. Hanks, “Rejudging the Business Judgment Rule ”, *The Business Lawyer* 1993, (1337) 1345 [↑](#footnote-ref-102)
103. B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 523. [↑](#footnote-ref-103)
104. Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971). [↑](#footnote-ref-104)
105. See F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 341; S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 211. This is especially relevant for the present master thesis, as freeze-outs are also a form of self-dealing. See: L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 935, footnote 10. [↑](#footnote-ref-105)
106. Weinberger, 711. See F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 1345. See paragraph 81 and following for a more elaborate discussion of this test. [↑](#footnote-ref-106)
107. W.T. Allen, J.B. Jacobs and L.E Strine, “Function over form: a reassessment of standards of review in Delaware corporation law”, *The Business Lawyer* 2001, (1287) 1295. [↑](#footnote-ref-107)
108. L.H. Lazarus, “Standards of review in conflict transactions: an examination of decisions rendered on motions to dismiss”, *Delaware Journal of Corporate Law* 2001, (911) 913-914; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 741-742; E.B. Rock, “Corporate law doctrine and the legacy of American legal realism”, *University of Pennsylvania Law Review* 2015, (2019) 2031-2032. [↑](#footnote-ref-108)
109. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 407 and following. [↑](#footnote-ref-109)
110. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 774; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 858. [↑](#footnote-ref-110)
111. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 774; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 858. [↑](#footnote-ref-111)
112. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 773-774. [↑](#footnote-ref-112)
113. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 773. [↑](#footnote-ref-113)
114. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 773-774. [↑](#footnote-ref-114)
115. S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 208-209; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 523; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 786; J.A.C. Hetherington, “Defining the scope of controlling shareholders’ fiduciary responsibilities”, *Wake Forest Law Review* 1987, (9) 12; E.R. Levy, “Freeze-out transactions the *Pure* way: reconciling judicial asymmetry between tender offers and negotiated mergers”, *West Virginia Law Review* 2004, (305) 320. [↑](#footnote-ref-115)
116. Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977), at p976. [↑](#footnote-ref-116)
117. Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110 (Del. 1994), 1113-1114, referring to Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987), 1344. [↑](#footnote-ref-117)
118. S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 208-209. [↑](#footnote-ref-118)
119. B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 525. [↑](#footnote-ref-119)
120. It should be noted that cash as consideration is not possible in the European Union (see further). [↑](#footnote-ref-120)
121. See for a more detailed discussion: S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 11-13 and 61-63. [↑](#footnote-ref-121)
122. Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977). For a discussion of this case, see: E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 658-664; S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 224-225; V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376. [↑](#footnote-ref-122)
123. Singer, 978. [↑](#footnote-ref-123)
124. Singer, 976. [↑](#footnote-ref-124)
125. Singer, 977-978. [↑](#footnote-ref-125)
126. Singer, 978. [↑](#footnote-ref-126)
127. Singer, 980. [↑](#footnote-ref-127)
128. S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 225; S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 63. [↑](#footnote-ref-128)
129. Tanzer v. International General Industries, Inc., 379 A.2d 1121 (Del. 1977). [↑](#footnote-ref-129)
130. Somewhat mysteriously introducing another test, the court notes, however, that this purpose of the majority needs to be “*bona fide*” (Tanzer, 1124). [↑](#footnote-ref-130)
131. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 664; S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 225. [↑](#footnote-ref-131)
132. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 667; F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 775. [↑](#footnote-ref-132)
133. E.J. Weiss, “The law of take out mergers: a historical perspective”, *New York University Law Review* 1981, (624) 667-670. [↑](#footnote-ref-133)
134. S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 225. [↑](#footnote-ref-134)
135. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). For a general discussion of this case, see: S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 223 and 226; S. Kenyon-Slade, *Mergers and takeovers in the US and UK. Law and practice*, Oxford, Oxford University Press, 2004, 832 p.; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 860-862; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 796-798; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 11-13; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 85-86. [↑](#footnote-ref-135)
136. Weinberger, 711. [↑](#footnote-ref-136)
137. B.M Resnick, “Recent Delaware decisions may prove to be ‘entirely unfair’ to minority shareholders in parent merger with partially owned subsidiary”, *Columbia Business Law Review* 2003, (253) 257 and 259. [↑](#footnote-ref-137)
138. Weinberger, 711. [↑](#footnote-ref-138)
139. Weinberger, 711. [↑](#footnote-ref-139)
140. Weinberger, 711. [↑](#footnote-ref-140)
141. Weinberger, 715. [↑](#footnote-ref-141)
142. Weinberger, 713. [↑](#footnote-ref-142)
143. Weinberger, 711-712. [↑](#footnote-ref-143)
144. Weinberger, 709. [↑](#footnote-ref-144)
145. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 862; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 12. [↑](#footnote-ref-145)
146. Rosenblatt v. Getty Oil, 493 A.2d 929 (Del. 1985). For a discussion of this case, see S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 230-231; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 863-864; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 800-803; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 15-17; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 86-87. [↑](#footnote-ref-146)
147. Getty Oil, 937. [↑](#footnote-ref-147)
148. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 864. [↑](#footnote-ref-148)
149. Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110 (Del. 1994). For a discussion of this case, see: S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 228 and 230-231; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 864-865; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 14-15; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 88-89. [↑](#footnote-ref-149)
150. Kahn, 1116. [↑](#footnote-ref-150)
151. In re Pure Resources, 808 A.2d 421 (Del. Ch. 2002), 441-442; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 13. [↑](#footnote-ref-151)
152. Kahn, 1115. [↑](#footnote-ref-152)
153. Kahn, 1117. [↑](#footnote-ref-153)
154. Kahn, 1117-1120. [↑](#footnote-ref-154)
155. Kahn, 1221. [↑](#footnote-ref-155)
156. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 830-831. [↑](#footnote-ref-156)
157. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 17; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 717. [↑](#footnote-ref-157)
158. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 865-871; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 4; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 7 and 20-21. [↑](#footnote-ref-158)
159. Solomon v. Pathe Communications Corp., 672 A.2d 35 (Del. 1996). For a discussion of this case, see: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 865-867; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 817-818; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 18-19; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 89-90. [↑](#footnote-ref-159)
160. Solomon, 39. [↑](#footnote-ref-160)
161. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 866-867; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 18; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 520. [↑](#footnote-ref-161)
162. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 867. See also In re Siliconix Inc. Shareholders Litigation, 2001 WL 716787 (Del. Ch. 2001), 6. [↑](#footnote-ref-162)
163. Solomon, 39. [↑](#footnote-ref-163)
164. Cfr. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808. See further for a more detailed analysis. [↑](#footnote-ref-164)
165. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 18; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 818. [↑](#footnote-ref-165)
166. In re Siliconix Inc. Shareholders Litigation, 2001 WL 716787 (Del. Ch. 2001). For a discussion of this case, see: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 867-868; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 819-822; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 19; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 91-93; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 530-532. For a similar case, see: In re Aquila, Inc. Shareholders Litigation, 805 A.2 184, 190 (Del. Ch. 2002). [↑](#footnote-ref-166)
167. Siliconix, 6. [↑](#footnote-ref-167)
168. Siliconix, 6. [↑](#footnote-ref-168)
169. Siliconix, 7. [↑](#footnote-ref-169)
170. Siliconix, 7. [↑](#footnote-ref-170)
171. G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 10-11; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 327. [↑](#footnote-ref-171)
172. Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001). For a discussion of this case, see: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 869-870; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 818-819; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 20-21; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 90-91; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 532-534. [↑](#footnote-ref-172)
173. Glassman, and 248. [↑](#footnote-ref-173)
174. Glassman, 248. [↑](#footnote-ref-174)
175. Glassman, 248. [↑](#footnote-ref-175)
176. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 870. [↑](#footnote-ref-176)
177. In re Pure Resources, 808 A.2d 421 (Del. Ch. 2002). [↑](#footnote-ref-177)
178. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 826. [↑](#footnote-ref-178)
179. In re Pure Resources, 808 A.2d 421 (Del. Ch. 2002). For a discussion of this case, see: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 870-871; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 825-832; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 21-22; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 94-100; J.E. Abramczyk, J.A Cincilla and J.D. Honaker, “Going-private ‘dilemma’? - Not in Delaware”, *The Business Lawyer* 2003, (1351) 1356-1359. [↑](#footnote-ref-179)
180. Hence, the condition of Kahn to shift the burden of proof to the plaintiff was not met. [↑](#footnote-ref-180)
181. Pure Resources, 424. [↑](#footnote-ref-181)
182. Pure Resources, 445. For a critique of these conditions, see A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 98-100. [↑](#footnote-ref-182)
183. Pure Resources, 445. [↑](#footnote-ref-183)
184. Pure resources, 446. [↑](#footnote-ref-184)
185. Pure Resources, 435-444. [↑](#footnote-ref-185)
186. Siliconix, 7. [↑](#footnote-ref-186)
187. Pure Resources, 439-441. See especially the Unocal case: Unocal Corp. V. Mesa Petroleum Co., 493 A.2d 946 (Del.1985). This argument is also made by: R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 821. [↑](#footnote-ref-187)
188. Pure Resources, 436, referring to Kahn, 1116. [↑](#footnote-ref-188)
189. Pure Resources, 436. See also B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 537-538. [↑](#footnote-ref-189)
190. Pure Resources, 441-442. [↑](#footnote-ref-190)
191. Wikipedia provides a good definition of the concept of “prisoner’s dilemma”: *“The prisoner's dilemma is a standard example of a game analyzed in game theory that shows why two completely ‘rational’ individuals might not cooperate, even if it appears that it is in their best interests to do so.”* See Wikipedia, <https://en.wikipedia.org/wiki/Prisoner%27s_dilemma>, consulted on 7 June 2016. [↑](#footnote-ref-191)
192. For a good description of the pressure to tender problem, see: L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808. This problem is discussed in more detail in chapter 8 on the economic analysis of freeze-outs. [↑](#footnote-ref-192)
193. Pure Resources, 443. [↑](#footnote-ref-193)
194. Pure Resources, 444. [↑](#footnote-ref-194)
195. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 22; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 830. [↑](#footnote-ref-195)
196. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 22. [↑](#footnote-ref-196)
197. G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, 1-26; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, 321-359. [↑](#footnote-ref-197)
198. In re Cox Communications, Inc. Shareholder Litigation, 879 A.2d 604 (Del. Ch. 2005), 623. [↑](#footnote-ref-198)
199. Making this distinction: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 872; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 330; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 22; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 722. [↑](#footnote-ref-199)
200. A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, 83-111; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, 707-745; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, 841-917; J.E. Abramczyk, J.A Cincilla and J.D. Honaker, “Going-private ‘dilemma’? - Not in Delaware”, *The Business Lawyer* 2003, 1351-1371. [↑](#footnote-ref-200)
201. E.R. Levy, “Freeze-out transactions the *Pure* way: reconciling judicial asymmetry between tender offers and negotiated mergers”, *West Virginia Law Review* 2004, 305-357; B.M Resnick, “Recent Delaware decisions may prove to be ‘entirely unfair’ to minority shareholders in parent merger with partially owned subsidiary”, *Columbia Business Law Review* 2003, 253-283; K.C. Cannon, “Augmenting the duties of directors to protect minority shareholders in the context of going-private transactions: the case for obligating directors to express a valuation opinion in unilateral tender offers after *Siliconix*, *Aquila* and *Pure Resources*”, *Columbia Business Law Review* 2003, 191-252; F. Stevelman, “Going Private at the Intersection of the Market and the Law”, *The Business Lawyer* 2007, 775-912. [↑](#footnote-ref-201)
202. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843; P.V. Letsou and S.M. Haas, “The dilemma that should never have been: minority freeze outs in Delaware”, *The Business Lawyer* 2005, 25-94; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, 321-359; F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, 205-236; B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, 519-558. This is also the approach adopted in the most recent case law of *Cox, CNX* and *MFW* (see further). [↑](#footnote-ref-202)
203. A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, 83-111; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, 707-745; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, 841-917; J.E. Abramczyk, J.A Cincilla and J.D. Honaker, “Going-private ‘dilemma’? - Not in Delaware”, *The Business Lawyer* 2003, 1351-1371. [↑](#footnote-ref-203)
204. This overview of the arguments is based on F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 330-332 and G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 24-29. [↑](#footnote-ref-204)
205. Siliconix, 6-7. See also M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 875; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 723. [↑](#footnote-ref-205)
206. Pure Resources, 441-442. [↑](#footnote-ref-206)
207. G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, 1-26. An empirical study by Bates, Lemmon & Linck comes to the result that there is no significant difference. See: T.W. Bates, M.L. Lemmon and J.S. Linck, “Shareholder wealth effects and bid negotiation in freeze-out deals: Are minority shareholders left out in the cold?”, *Journal of Financial Economics* 2006, 681-708. However, the methodology of this study has been criticized: (1) the sample is smaller than that of Subramanian’s study, (2) no distinction is made between Delaware freeze-outs and freeze-outs in other jurisdictions, and (3) there is a classification problem: tender-offers that are a part of the execution of a (one-step) merger agreement should be treated as a one-step freeze-out subject to an entire fairness review, according to *Hartley v. Peapod, Inc.,* No. 19025, 2002 WL 31957458 (Del. Ch. 2002), and hence should be excluded from the sample of two-step freeze-outs. See for the methodological critique: G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) footnote 3, 8 and 14; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) footnote 69. For a discussion of *Hartley*, see E.R. Levy, “Freeze-out transactions the *Pure* way: reconciling judicial asymmetry between tender offers and negotiated mergers”, *West Virginia Law Review* 2004, (305) 333-334. [↑](#footnote-ref-207)
208. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, 321-359. [↑](#footnote-ref-208)
209. Siliconix, 7. See also: P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 723; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 85. [↑](#footnote-ref-209)
210. Pure Resources, 439-441. See also for this argument: G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 24-25; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 820-822; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 331. *Contra:* M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 876; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 723; A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 109-110. [↑](#footnote-ref-210)
211. A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 103. [↑](#footnote-ref-211)
212. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 26-28; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 332 [↑](#footnote-ref-212)
213. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 30-39. [↑](#footnote-ref-213)
214. P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 727-728; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 876-877; J.E. Abramczyk, J.A Cincilla and J.D. Honaker, “Going-private ‘dilemma’? - Not in Delaware”, *The Business Lawyer* 2003, (1351) 1365-1366. [↑](#footnote-ref-214)
215. E.R. Levy, “Freeze-out transactions the *Pure* way: reconciling judicial asymmetry between tender offers and negotiated mergers”, *West Virginia Law Review* 2004, 305-357; B.M Resnick, “Recent Delaware decisions may prove to be ‘entirely unfair’ to minority shareholders in parent merger with partially owned subsidiary”, *Columbia Business Law Review* 2003, 253-283; K.C. Cannon, “Augmenting the duties of directors to protect minority shareholders in the context of going-private transactions: the case for obligating directors to express a valuation opinion in unilateral tender offers after *Siliconix*, *Aquila* and *Pure Resources*”, *Columbia Business Law Review* 2003, 191-252; F. Stevelman, “Going Private at the Intersection of the Market and the Law”, *The Business Lawyer* 2007, 775-912. Interestingly enough, Stevelman proposes an entire fairness review for freeze-outs, unless the board has done a market check by trying to auction off the corporation to independent third parties. However, as this proposal has not attracted much attention in the literature, it will not be further discussed. [↑](#footnote-ref-215)
216. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 332-333; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 837-838; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 23. [↑](#footnote-ref-216)
217. Pure Resources, p436, referring to Kahn, p1116. [↑](#footnote-ref-217)
218. A.C. Pritchard, “Tender offers by controlling shareholders: the specter of coercion and fair price”, *Berkeley Business Law Journal* 2004, (83) 102. [↑](#footnote-ref-218)
219. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, 321-359; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, 1-26. [↑](#footnote-ref-219)
220. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 333; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 23; P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 724; J.E. Abramczyk, J.A Cincilla and J.D. Honaker, “Going-private ‘dilemma’? - Not in Delaware”, *The Business Lawyer* 2003, (1351) 1367-1369. [↑](#footnote-ref-220)
221. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 333; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 23. For example Allen, Jacobs and Strine have proposed convergence “down” towards the business judgment rule if there is both approval by a special committee and by a majority of the minority. See W.T. Allen, J.B. Jacobs and L.E Strine, “Function over form: a reassessment of standards of review in Delaware corporation law”, *The Business Lawyer* 2001, 1287-1321. [↑](#footnote-ref-221)
222. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843; P.V. Letsou and S.M. Haas, “The dilemma that should never have been: minority freeze outs in Delaware”, *The Business Lawyer* 2005, 25-94; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70; F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, 321-359; F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, 205-236. Aronstam, Balotti and Rehbock have also proposed another hybrid solution, involving a “limited fairness hearing” for two-step freeze-outs. See: B.R. Aronstam, R.F. Balotti, T. Rehbock, “Delaware’s going-private dilemma: fostering protections for minority shareholders in the wake of *Siliconix* and *Unocal Exploration*”, *The Business Lawyer* 2003, (519) 551-556. Because this proposal is less developed than the other hybrid solution, it is not further discussed in this master thesis. [↑](#footnote-ref-222)
223. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843 [↑](#footnote-ref-223)
224. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-224)
225. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 61. [↑](#footnote-ref-225)
226. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 337; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 49; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 818 and 837-838. [↑](#footnote-ref-226)
227. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 29 and following. [↑](#footnote-ref-227)
228. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 7 and 30; See also: F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 334. [↑](#footnote-ref-228)
229. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 30-38. [↑](#footnote-ref-229)
230. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 30-31. [↑](#footnote-ref-230)
231. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 34-38. Subramanian distinguishes three types of efficency losses: non-reversible value reductions, the facilitation of value-reducing freeze-outs, and a reduced acess to minority capital due a lemons effect on pricing of minority shares. [↑](#footnote-ref-231)
232. F. Restrepo, “Do different standards of judicial review affect the gains of minority shareholders in freeze-out transactions? A re-examination of *Siliconix*”, *Harvard Business Law Review* 2013, (321) 336, footnote 67; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 35-37; L.A. Bebchuk and M. Kahan, “Adverse selection and gains to controllers in corporate freeze-outs” in R.K. Morck, *Concentrated Corporate Ownership*, Chicago, University of Chicago Press, 2000, 247-259. [↑](#footnote-ref-232)
233. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 39-48. [↑](#footnote-ref-233)
234. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 39-40. [↑](#footnote-ref-234)
235. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 45. [↑](#footnote-ref-235)
236. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 49 and 55. [↑](#footnote-ref-236)
237. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 59 and 61. [↑](#footnote-ref-237)
238. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 61. [↑](#footnote-ref-238)
239. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 50-51. [↑](#footnote-ref-239)
240. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843. [↑](#footnote-ref-240)
241. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-241)
242. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, 205-236. See however the critical note of P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, 707-745. [↑](#footnote-ref-242)
243. In re Cox Communications, Inc. Shareholder Litigation, 879 A.2d 604 (Del. Ch. 2005). For a discussion of this case, see: F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 211; F. Stevelman, “Going Private at the Intersection of the Market and the Law”, *The Business Lawyer* 2007, (775) 843-846 and 857-876. [↑](#footnote-ref-243)
244. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, 1-26. [↑](#footnote-ref-244)
245. Cox Communications, 606 and 643-644. [↑](#footnote-ref-245)
246. Cox Communications, 648. [↑](#footnote-ref-246)
247. Cox Communications, 618 [↑](#footnote-ref-247)
248. Cox Communications, 619-620. [↑](#footnote-ref-248)
249. Cox Communications, 607 and 646. [↑](#footnote-ref-249)
250. In re John Q. Hammons Hotels Inc. Shareholder Litigation, 2009 WL 3165613 (Del Ch. 2009). [↑](#footnote-ref-250)
251. Hammons, 2 and 12. [↑](#footnote-ref-251)
252. Strine first served as Vice Chancellor, until he was appointed Chancellor of the Delaware Chancery Court in 2011. He currently serves as chief justice on the Delaware Supreme Court. Source: Wikipedia, <https://en.wikipedia.org/wiki/Leo_E._Strine,_Jr>, consulted on 7 June 2016. We refer to the title that Strine occupied at the time of the judgment. [↑](#footnote-ref-252)
253. In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013), 502-503 and 535-536. See for a discussion of this case: E.B. Rock, “Corporate law doctrine and the legacy of American legal realism”, *University of Pennsylvania Law Review* 2015, 2019-2053; M. Bitton and O. Minnes, “Exploring the standard of review of transactions with controlling shareholders after *In Re MFW Shareholders litigation* (decided May 29th, 2013)”, *Business, Entrepreneurship & the Law* 2014, 447-466. [↑](#footnote-ref-253)
254. MFW, 502-503, citing the following authors: G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70; R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843. [↑](#footnote-ref-254)
255. Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014). [↑](#footnote-ref-255)
256. In re CNX Gas Corp. Shareholder Litigation, 4 A.3d 397 (Del. Ch. 2010). For a discussion of this case, see: F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 212-213. [↑](#footnote-ref-256)
257. In re CNX Gas Corp., 2010 WL 2690402 (Del. 2010). [↑](#footnote-ref-257)
258. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 213. [↑](#footnote-ref-258)
259. In re Cox Radio Shareholder Litigation, 2010 WL 1806616 (Del. Ch. 2010). For a discussion of this case, see F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 213-214. [↑](#footnote-ref-259)
260. Cox Radio, 2010 WL 4721568 (Del. 2010). [↑](#footnote-ref-260)
261. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, 205-236. [↑](#footnote-ref-261)
262. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 224-225. [↑](#footnote-ref-262)
263. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, (205) 223-225. [↑](#footnote-ref-263)
264. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-264)
265. P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, (707) 733-745. [↑](#footnote-ref-265)
266. Cfr. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1356; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, (487) 491. [↑](#footnote-ref-266)
267. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1359; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, 487-519. [↑](#footnote-ref-267)
268. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1376. [↑](#footnote-ref-268)
269. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1360-1361; F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 762-763. [↑](#footnote-ref-269)
270. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 762-763; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 9, footnote 6; V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1361-1362; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, (487) 448 and 509; Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1340-1341. [↑](#footnote-ref-270)
271. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808. [↑](#footnote-ref-271)
272. G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 8-9. [↑](#footnote-ref-272)
273. G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 9, footnote 6. [↑](#footnote-ref-273)
274. For a discussion of the role of the board in tender offers and especially on takeover defences, see: S.M. Bainbridge, *Mergers and acquisitions*, New York, Foundation Press, 2003, 311-410. [↑](#footnote-ref-274)
275. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912. [↑](#footnote-ref-275)
276. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843. [↑](#footnote-ref-276)
277. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-277)
278. F. Restrepo and G. Subramanian, “The effect of Delaware doctrine on freeze-out structure and outcomes: evidence on the unified approach”, *Harvard Business Law Review* 2015, 205-236. [↑](#footnote-ref-278)
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280. See for example: P. Gupta, “Freezeouts in Delaware: an exploration of the appropriate standard of review”, *Columbia Business Law Review* 2012, 707-745. [↑](#footnote-ref-280)
281. See for example: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, 841-917; T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, 497-519; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 57 p.; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, 391-439; The High Level Group of Company Law Experts, *Report on issues related to takeover* bids, 10 January 2012, available at <http://ec.europa.eu/internal_market/company/docs/takeoverbids/2002-01-hlg-report_en.pdf>, 60-61 (hereinafter “Winter Report”); Marccus Partners (eds.), *The Takeover Bids Directive Assessment Report*, 2011, available at <http://ec.europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf>, 315 (hereinafter “TOBD Assessment Report”). [↑](#footnote-ref-281)
282. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 877; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 932; TOBD Assessment Report, 44. [↑](#footnote-ref-282)
283. Third Council Directive nr. 78/855/EEC, 9 October 1978 based on article 54 (3) (g) of the treaty concerning mergers of public limited liability companies, *O.J. L.* 20 October 1978, nr. 295, 36. For a discussion of the Merger Directive, see: S. Grundmann, *European company law: organization, finance and capital markets*, Antwerpen, Intersentia, 2012, 667-697. [↑](#footnote-ref-283)
284. S. Grundmann, *European company law: organization, finance and capital markets*, Antwerpen, Intersentia, 2012, 675. [↑](#footnote-ref-284)
285. See article 671 and 672 Belgian Companies Code. [↑](#footnote-ref-285)
286. See article 2:325 Dutch Civil Code. [↑](#footnote-ref-286)
287. See also M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 877; TOBD Assessment Report, 44 and 227-228. [↑](#footnote-ref-287)
288. S. Grundmann, *European company law: organization, finance and capital markets*, Antwerpen, Intersentia, 2012, 675 and 790-791. [↑](#footnote-ref-288)
289. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 878. [↑](#footnote-ref-289)
290. M. Germain (G. Ripert and R.Roblot, eds.), *Traité de droit commercial*, I.2 (les sociétés commerciales), Paris, L.G.D.J., 2002, 376. [↑](#footnote-ref-290)
291. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912. [↑](#footnote-ref-291)
292. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 901. See for a detailed discussion: G. O’Dea, J. Long and A. Smyth, *Schemes of arrangement. Law and Practice*, Oxford, Oxford University Press, 315 p. [↑](#footnote-ref-292)
293. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 901; G. O’Dea, J. Long and A. Smyth, *Schemes of arrangement. Law and Practice*, Oxford, Oxford University Press, 200-201 [↑](#footnote-ref-293)
294. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 901. [↑](#footnote-ref-294)
295. See §292 Aktiengesetz. See also: TOBD Assessment Report, 44-45; M. Raaijmakers, “Uitstoting minderheid”, 389. [↑](#footnote-ref-295)
296. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 902. [↑](#footnote-ref-296)
297. See for example: M. Raaijmakers, “Uitstoting minderheid”, 397-407. [↑](#footnote-ref-297)
298. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 882; M. Raaijmakers, “Uitstoting minderheid”, 399. [↑](#footnote-ref-298)
299. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 883. [↑](#footnote-ref-299)
300. M. Raaijmakers, “Uitstoting minderheid”, 410. However, the Netherlands do have something similar to an appraisal remedy for cross-border mergers (see article 333h of the Dutch Civil Code). [↑](#footnote-ref-300)
301. Cfr. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 878. [↑](#footnote-ref-301)
302. Directive European Parliament and Council nr 2004/25/EC, 21 April 2004 on  
     takeover bids, *O.J. L.* 20 April 2004, nr. 142, 12. [↑](#footnote-ref-302)
303. TOBD Assessment Report, 220. [↑](#footnote-ref-303)
304. T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, (497) 498; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 888-889; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 404-408; TOBD Assessment Report, 221-222. [↑](#footnote-ref-304)
305. Compare: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 892-893 (arguing that the presumption is probably not rebuttable, or at least very hard to rebut); C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 421; P.D. Olden, “Uitstoting- en verkoopprocedure” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (835) 844 (arguing that the presumption is rebuttable). [↑](#footnote-ref-305)
306. T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, (497) 505-509. [↑](#footnote-ref-306)
307. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 893. [↑](#footnote-ref-307)
308. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 892; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 421; TOBD Assessment Report, 223. [↑](#footnote-ref-308)
309. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 914; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 36; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 391, 393 and 438-439. [↑](#footnote-ref-309)
310. TOBD Assessment Report, 225-226; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 393. This is allowed by recital 24 of the Takeover Directive. [↑](#footnote-ref-310)
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312. For an overview of the Dutch law on squeeze-outs, see: C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 398; M. Raaijmakers, “Uitstoting minderheid”, 386-387 and 393-394; P.D. Olden, “Uitstoting- en verkoopprocedure” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, 835-852; M. Raaijmakers, and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1161-1172. [↑](#footnote-ref-312)
313. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 429. [↑](#footnote-ref-313)
314. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 429. [↑](#footnote-ref-314)
315. Decree of 12 September 2007, "houdende implementatie van richtlijn nr. 2004/25/EG van het Europees Parlement en de Raad van de Europese Unie van 21 april 2004 betreffende het openbaar overnamebod (PbEU L 142) en houdende modernisering van de regels met betrekking tot het openbaar overnamebod”, nr. BWBR0022511. [↑](#footnote-ref-315)
316. For an overview of the Belgian law on squeeze-outs, see: K. Byttebier and T. Wera, “Modellen van minderheidsbescherming in de wet van 1 April 2007 en haar uitvoeringsbesluiten. Een kritische analyse” in K. Byttebier and T. Wera (eds.), *Actuele evoluties inzake overnames en herstructureringen*, Antwerp, Intersentia, 2014, (177) 237-246; R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, 179-209: M. Van Der Haegen, “Les nouvelles dispositions concernant le squeeze-out et le sell-out et la position des actionnaires minoritaires” in R. Feltkamp, B. Feron and G. T’Jonck (eds.), *De nieuwe OBA-wet*, Brussels, Buylant, 2008, 317-361; C. Van der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, 331-375; T. Verhoest, “De ‘squeeze-out’ en de ‘sell-out’ onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, 172-202; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, 391-439. [↑](#footnote-ref-316)
317. Royal Decree of 27 April 2007 on public squeeze-outs, *Belgian Official Journal* 23 May 2007. [↑](#footnote-ref-317)
318. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 424-425. [↑](#footnote-ref-318)
319. C. Van der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, (331) 354. [↑](#footnote-ref-319)
320. T. Verhoest, “De ‘squeeze-out’ en de ‘sell-out’ onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (172) 186. [↑](#footnote-ref-320)
321. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 425; R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 192. [↑](#footnote-ref-321)
322. Stating that this memorandum is rather useless: C. Van der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, (331) 368-369. Stating that the memorandum has some use: R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, 179 199. [↑](#footnote-ref-322)
323. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 199; M. Fyon, “La réforme du droit des offres publiques d’acquisition (première partie)”, *Bank Fin. R.* 2007, (242) 266-268, and the sources cited there. [↑](#footnote-ref-323)
324. Court of Appeals Brussels 19 January 2001, *JT* 2001, 105. This is also the vision shared by most of the doctrine. See: R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 199; M. Fyon, “La réforme du droit des offres publiques d’acquisition (première partie)”, *Bank Fin. R.* 2007, (242) 266-268, and the sources cited there. [↑](#footnote-ref-324)
325. While this reasoning might be legally correct *de lege lata*, we believe that it is criticizable from an economic perspective. Indeed, the board of directors has an important role in bargaining with the majority shareholder to ensure that the squeeze-out price is fair, in our opinion. This role can only be fulfilled if the board is independent from the majority shareholder. See further in paragraph 255. [↑](#footnote-ref-325)
326. Law of 2 August 2002 on the supervision on the financial sector and the financial services, *Belgian Official Journal* 4 September 2002. [↑](#footnote-ref-326)
327. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 192; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 425; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 425. [↑](#footnote-ref-327)
328. Royal Decree of 27 April 2007 on public takeover bids, *Belgian Official Journal* 23 May 2007 (the “Takeover Decree). [↑](#footnote-ref-328)
329. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 203; C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 409; C. Van der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, (331) 348; T. Verhoest, “De ‘squeeze-out’ en de ‘sell-out’ onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (172) 195. [↑](#footnote-ref-329)
330. T. Verhoest, “De ‘squeeze-out’ en de ‘sell-out’ onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (172) 194. Nevertheless, this does not often pose a problem for controlling shareholders in practice, as was suggested in conversation with professor M. Wyckaert. [↑](#footnote-ref-330)
331. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 425. [↑](#footnote-ref-331)
332. Cfr. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 203; T. Verhoest, “De ‘squeeze-out’ en de ‘sell-out’ onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (172) 195-196. [↑](#footnote-ref-332)
333. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 203; K. Byttebier and T. Wera, “Modellen van minderheidsbescherming in de wet van 1 April 2007 en haar uitvoeringsbesluiten. Een kritische analyse” in K. Byttebier and T. Wera (eds.), *Actuele evoluties inzake overnames en herstructureringen*, Antwerp, Intersentia, 2014, (177) 243. [↑](#footnote-ref-333)
334. For a discussion of these provisions, see: V. De Schryver, “Informatieplichten in het kader van een vrijwillig openbaar overnamebod” in H. De Wulf and C. Van Der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerpen, Intersentia, 2008, (73) 115-118; J.-M. Nelissen Grade, “Het vrijwillig openbaar bod” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (11) 31-35. [↑](#footnote-ref-334)
335. J.-M. Nelissen Grade, “Het vrijwillig openbaar bod” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (11) 34. [↑](#footnote-ref-335)
336. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376. [↑](#footnote-ref-336)
337. Cfr. Report to the King with the Royal Decree of 27 April 2007 on public takeover bids, *Belgian Official Journal* 23 May 2007, commentary to article 20-23. See also: V. De Schryver, “Informatieplichten in het kader van een vrijwillig openbaar overnamebod” in H. De Wulf and C. Van Der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerpen, Intersentia, 2008, (73) 115; J.-M. Nelissen Grade, “Het vrijwillig openbaar bod” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (11) 31. [↑](#footnote-ref-337)
338. V. De Schryver, “Informatieplichten in het kader van een vrijwillig openbaar overnamebod” in H. De Wulf and C. Van Der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerpen, Intersentia, 2008, (73) 115. [↑](#footnote-ref-338)
339. R. Nieuwdorp and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, (179) 199; M. Fyon, “La réforme du droit des offres publiques d’acquisition (première partie)”, *Bank Fin. R.* 2007, (242) 266-268, and the sources cited there. [↑](#footnote-ref-339)
340. Court of Appeals Brussels 19 January 2001, *JT* 2001, 105. [↑](#footnote-ref-340)
341. V. De Schryver, “Informatieplichten in het kader van een vrijwillig openbaar overnamebod” in H. De Wulf and C. Van Der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerpen, Intersentia, 2008, (73) 115. [↑](#footnote-ref-341)
342. TOBD Assessment Report, 45 and 243. [↑](#footnote-ref-342)
343. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912; C. Van der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, (331) 375. [↑](#footnote-ref-343)
344. For literature discussing the relationship between squeeze-outs and the right to property, see: Winter Report, 61-62; M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, 159-182; M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 12-15. [↑](#footnote-ref-344)
345. ECtHR 13 June 1979, nr. 6833/74, Marckx v. Belgium, § 63. [↑](#footnote-ref-345)
346. ECtHR 23 September 1982, nr. 7152/75, Sporrong and Lönnroth v. Sweden. [↑](#footnote-ref-346)
347. ECtHR 21 February 1986, nr. 8793/79, James and others v. the United Kingdom, §37. [↑](#footnote-ref-347)
348. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 162; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 13. [↑](#footnote-ref-348)
349. European Commission of Human Rights 12 October 1982, nr. 8588/ 79 and nr. 8589/79, Bramelid and Malmström v. Sweden. [↑](#footnote-ref-349)
350. Winter Report, 60-62; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 12-15. [↑](#footnote-ref-350)
351. C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 13. [↑](#footnote-ref-351)
352. C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 14. [↑](#footnote-ref-352)
353. ECtHR 21 February 1986, nr. 8793/79, James and others v. the United Kingdom. [↑](#footnote-ref-353)
354. James, §46. See: C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 13. [↑](#footnote-ref-354)
355. James, §45. Cfr. also §40: *“the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.”* [↑](#footnote-ref-355)
356. C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 14. See also Winter Report, 61. [↑](#footnote-ref-356)
357. Winter Report, 61; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 14-15. See also M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 912. [↑](#footnote-ref-357)
358. C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 15. See further in chapter 8 why a lower threshold for squeeze-outs is actually more economically efficient. [↑](#footnote-ref-358)
359. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, 159-182. [↑](#footnote-ref-359)
360. European Commission of Human Rights 12 October 1982, nr. 8588/ 79 and nr. 8589/79, Bramelid and Malmström v. Sweden. [↑](#footnote-ref-360)
361. Bramelid, § 1.c). [↑](#footnote-ref-361)
362. Bramelid, § 1.d). [↑](#footnote-ref-362)
363. Bramelid, § 1.d). [↑](#footnote-ref-363)
364. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 170. [↑](#footnote-ref-364)
365. ECtHR 30 March 2000, nr. 44324/98, Kind v. Germany. [↑](#footnote-ref-365)
366. Kind, p. 5: *“les dispositions législatives litigieuses ont trait à la réglementation des sociétés commerciales et concernent avant tout les relations des actionnaires entre eux*.” [↑](#footnote-ref-366)
367. ECtHR 19 July 2007, nr. 71440/01, Freitag v. Germany. [↑](#footnote-ref-367)
368. ECtHR 21 February 1986, nr. 8793/79, James and others v. the United Kingdom. [↑](#footnote-ref-368)
369. James, §38. [↑](#footnote-ref-369)
370. James, §41 [↑](#footnote-ref-370)
371. James, §38. [↑](#footnote-ref-371)
372. James, §46. [↑](#footnote-ref-372)
373. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 167-170 [↑](#footnote-ref-373)
374. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 167-168. [↑](#footnote-ref-374)
375. Krohn admits this already to a certain extent: M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 167, footnote 28. [↑](#footnote-ref-375)
376. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 169-170. [↑](#footnote-ref-376)
377. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, (159) 170. [↑](#footnote-ref-377)
378. ECtHR 16 January 2001, nr. 35730/97, Offerhaus v. the Netherlands. [↑](#footnote-ref-378)
379. M. Krohn, “Minority Squeeze-Outs and the European Convention on Human Rights”, *European Business Law Review* 2004, 159-182. [↑](#footnote-ref-379)
380. Cfr. Winter Report, 60-62. [↑](#footnote-ref-380)
381. High Council 14 September 2007, Centaurus/Versatel, *JOR* 2007/237, note B.F. Assink. [↑](#footnote-ref-381)
382. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 439. [↑](#footnote-ref-382)
383. This differences in approach also exists in other areas of law. Cfr. E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 223-224. [↑](#footnote-ref-383)
384. C. Van der Elst and L. Van den Steen, “Balancing the interests of minority and majority shareholders: a comparative analysis of squeeze-out and sell-out rights”, *European Company and Financial Law Review* 2009, (391) 398; M. Raaijmakers, “Uitstoting minderheid”, 386-387 and 393-394. [↑](#footnote-ref-384)
385. See for authors who discuss these alternative freeze-out techniques: P.P. de Vries, “Exit voor minderheidsaandeelhouders: uitkoop en alternatieven”, *O&F* 2004, 39-44; R.H. Hermans, “De Ondernemingskamer geeft richtlijnen voor de behandeling van minderheidsaandeelhouders die niet op een openbaar bod zijn ingegaan (note under Commercial Chamber 14 December 2005)”, *Ondernemingsrecht* 2006, 110-115; W.B. Kuijpers and A. van der Krans, “De positie van minderheidsaandeelhouders en het openbaar bod”, *O&F* 2014, 19-31; M. Raaijmakers, “Uitstoting minderheid”, 377-410; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, 1125-1174; E.H. Rebers and R.H. Maatman, “De rol van aandeelhouders bij een openbaar bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, 375-399; L. Scheepbouwer, “Post-closing herstructurering: goede ideeën beginnen met goede koffie”, *V&O* 2013, n° 12, 204-208; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, 853-868; P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, 137-142. [↑](#footnote-ref-385)
386. M. Raaijmakers, “Uitstoting minderheid”, 397-407. [↑](#footnote-ref-386)
387. M. Raaijmakers, “Uitstoting minderheid”, 397. [↑](#footnote-ref-387)
388. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 137. [↑](#footnote-ref-388)
389. M. Raaijmakers, “Uitstoting minderheid”, 407; P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 140. [↑](#footnote-ref-389)
390. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137), 140; M. Raaijmakers, “Uitstoting minderheid”, 407-408. [↑](#footnote-ref-390)
391. M. Raaijmakers, “Uitstoting minderheid”, 405-406. [↑](#footnote-ref-391)
392. M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1167. [↑](#footnote-ref-392)
393. M. Raaijmakers, “Uitstoting minderheid”, 390-391 and 398-399. [↑](#footnote-ref-393)
394. The Dutch NV has a system of a two-tier board: a management board (*“raad van bestuur”*) and a supervisory board (*“raad van commissarissen”*). [↑](#footnote-ref-394)
395. M. Raaijmakers, “Uitstoting minderheid”, 400. [↑](#footnote-ref-395)
396. M. Raaijmakers, “Uitstoting minderheid”, 407. [↑](#footnote-ref-396)
397. M. Raaijmakers, “Uitstoting minderheid”, 389. [↑](#footnote-ref-397)
398. M. Raaijmakers, “Uitstoting minderheid”, 391-392 and 399-400. [↑](#footnote-ref-398)
399. M. Raaijmakers, “Uitstoting minderheid”, 392. [↑](#footnote-ref-399)
400. M. Raaijmakers, “Uitstoting minderheid”, 391-392. [↑](#footnote-ref-400)
401. President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB*, JOR* 1999/174, note G. van Solinge. [↑](#footnote-ref-401)
402. President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB*, JOR* 1999/174, note G. van Solinge, nr. 5. [↑](#footnote-ref-402)
403. President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB*, JOR* 1999/174, note G. van Solinge, nr. 5. [↑](#footnote-ref-403)
404. President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB*, JOR* 1999/174, note G. van Solinge, nr. 6. [↑](#footnote-ref-404)
405. President tribunal of Amsterdam 11 June 1999, Leyinvest/Vendex/KBB*, JOR* 1999/174, note G. van Solinge, nr. 10. [↑](#footnote-ref-405)
406. Tribunal of Amsterdam 6 February 2002, Leyinvest/Vendex/KBB*, JOR* 2002/61. [↑](#footnote-ref-406)
407. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182 (hereinafter “*Versatel I (CC)*”); Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans (hereinafter “*Versatel II (CC)*”). [↑](#footnote-ref-407)
408. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink; *NJ* 2007, 610; *ARO* 2007, 154 (hereinafter “*Versatel I (SC)*”); Supreme Court 14 September 2007, Centaurus/Versatel, nr. R06/030HR, *JOR* 2007/232 (hereinafter “*Versatel II (SC)*”); Supreme Court 14 September 2007, Centaurus/Versatel, nr. R06/031HR, *JOR* 2007/239; *NJ* 2007, 612, note J.M.M. Maeijer (hereinafter “*Versatel III*”). [↑](#footnote-ref-408)
409. For a discussion of this case, see: M. Raaijmakers, “Uitstoting minderheid”, 400-405; E.H. Rebers and R.H. Maatman, “De rol van aandeelhouders bij een openbaar bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (375) 390-391; M.W.H. van den Heuvel, “De driehoeksfusie, tracking stock en beperking van voorkeursrechten als mogelijk uitstootmiddel in de Versatel-jurisprudentie”, *V&O* 2007, 154-159; C. de Groot, “De drie Versatel-uitspraken (note under Supreme Court 14 September 2007)”, *O&F* 2008, 16-22; G.C. Meijer, “Over de juridische fusie na een openbaar bod”, *V&O* 2005, 166-169; R.H. Hermans, “De Ondernemingskamer geeft richtlijnen voor de behandeling van minderheidsaandeelhouders die niet op een openbaar bod zijn ingegaan (note under Commercial Chamber 14 December 2005)”, *Ondernemingsrecht* 2006, 110-115; H.M. Bartman, “Note under Supreme Court 14 September 2007 (Versatel II)”, *JOR* 2007/239; M. Raaijmakers, “Versatel: werkt Code Tabaksblat nog na gestanddoening openbaar bod? (note under Commercial Chamber 27 September 2005 (*Versatel I*) and 14 December 2005 (*Versatel II*))”, *AA* 2006, 198-207. [↑](#footnote-ref-409)
410. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182. [↑](#footnote-ref-410)
411. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr 3.15. However, this argument is not very convincing: while the possibility of the squeeze-out was clearly written to favour majority shareholders, the threshold of 95% was included to protect minority shareholders. Nevertheless, we support alternative freeze-out techniques below 95%, because they make sense from an economic perspective (see further in chapter 8). [↑](#footnote-ref-411)
412. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr. 3.16. [↑](#footnote-ref-412)
413. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr. 3.18. [↑](#footnote-ref-413)
414. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr. 3.20. [↑](#footnote-ref-414)
415. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink. [↑](#footnote-ref-415)
416. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink, nr. 4.2. [↑](#footnote-ref-416)
417. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink, nr. 4.3. [↑](#footnote-ref-417)
418. See also: Commercial Chamber Court of Amsterdam 27 September 2005, *JOR* 2005/272, nr. 3.15. [↑](#footnote-ref-418)
419. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink, nr. 4.3. See for a similar decision: Tribunal of Amsterdam 6 February 2002, Leyinvest/Vendex/KBB*, JOR* 2002/61. [↑](#footnote-ref-419)
420. Conclusions L. Timmerman to Supreme Court 14 September 2007, Centaurus/Versatel, *JOR* 2007/237, nr. 4.16. See also: Commercial Chamber Court of Amsterdam 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.25. [↑](#footnote-ref-420)
421. M. Raaijmakers, “Uitstoting minderheid”, 399, 404 and 410. [↑](#footnote-ref-421)
422. See for example: M. Raaijmakers, “Uitstoting minderheid”, 405 and 410; W.B. Kuijpers and A. van der Krans, “De positie van minderheidsaandeelhouders en het openbaar bod”, *O&F* 2014, (19) 28-30; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1172 and 1174; E.H. Rebers and R.H. Maatman, “De rol van aandeelhouders bij een openbaar bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (375) 396-397; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 867. [↑](#footnote-ref-422)
423. G.C. Meijer, “Over de juridische fusie na een openbaar bod”, *V&O* 2005, (166) 169; P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 138. [↑](#footnote-ref-423)
424. E.H. Rebers and R.H. Maatman, “De rol van aandeelhouders bij een openbaar bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (375) 392 [↑](#footnote-ref-424)
425. R.H. Hermans, “De Ondernemingskamer geeft richtlijnen voor de behandeling van minderheidsaandeelhouders die niet op een openbaar bod zijn ingegaan (note under Commercial Chamber 14 December 2005)”, *Ondernemingsrecht* 2006, (110) 113, nr. 5. [↑](#footnote-ref-425)
426. Conclusions L. Timmerman to Supreme Court 14 September 2007, Centaurus/Versatel, *JOR* 2007/237, nr. 4.15. [↑](#footnote-ref-426)
427. European Commission of Human Rights 12 October 1982, nr. 8588/ 79 and nr. 8589/79, Bramelid and Malmström v. Sweden. [↑](#footnote-ref-427)
428. Supreme Court 8 December 1993, *NJ* 1994, 273. [↑](#footnote-ref-428)
429. Conclusions L. Timmerman to Supreme Court 14 September 2007, Centaurus/Versatel, *JOR* 2007/237, nr. 3.17-3.20. However, it should be noted that the *“geschillenregeling”* for private companies is not really comparable to freeze-outs in listed companies. [↑](#footnote-ref-429)
430. Versatel I (SC), nr. 4.4: [↑](#footnote-ref-430)
431. This article reads as follows: *“Een commissaris neemt niet deel aan de discussie en de besluitvorming over een onderwerp of transactie waarbij deze commissaris een tegenstrijdig belang heeft.”* Freely translated: *“a director of the supervisory board does not participate in the debate and decision about a topic or transaction where the director has a conflicting interest”.* [↑](#footnote-ref-431)
432. Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans. [↑](#footnote-ref-432)
433. Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans, nr. 3.2-3.4. [↑](#footnote-ref-433)
434. Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans, nr. 3.6. [↑](#footnote-ref-434)
435. M. Raaijmakers, “Uitstoting minderheid”, 401. [↑](#footnote-ref-435)
436. Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans, nr. 3.6. [↑](#footnote-ref-436)
437. H.M. Bartman, “Note under Supreme Court 14 September 2007 (Versatel II)”, *JOR* 2007/239, nr. 3-4. [↑](#footnote-ref-437)
438. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R06/030HR, *JOR* 2007/232. [↑](#footnote-ref-438)
439. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R06/031HR, *JOR* 2007/239; *NJ* 2007, 612, note J.M.M. Maeijer. [↑](#footnote-ref-439)
440. M. Raaijmakers, “Uitstoting minderheid”, 405; M. Raaijmakers, “Versatel: werkt Code Tabaksblat nog na gestanddoening openbaar bod? (note under Commercial Chamber 27 September 2005 (*Versatel I*) and 14 December 2005 (*Versatel II*))”, *AA* 2006, (198) 201 and 205-206. [↑](#footnote-ref-440)
441. Kuijpers & van der Krans, 28. [↑](#footnote-ref-441)
442. Currently, the requirement that the bidder must have acquired at least 95% of the shares also serves as a “market check”, as the bidder must offer a price that is high enough so that it can reach this threshold. However, as will be discussed in chapter 8, this threshold is too high, which could deter efficient takeovers. [↑](#footnote-ref-442)
443. Cfr. also: M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1170-1171. [↑](#footnote-ref-443)
444. Law 28 September 2006 on the rules regarding financial markets and the supervision upon them, BWBR0020368. [↑](#footnote-ref-444)
445. M. Raaijmakers, “Uitstoting minderheid”, 402-403. [↑](#footnote-ref-445)
446. Commercial Chamber 8 December 2007, Centaurus/Versatel, nrs. 1446/2005, 1847/2005 and 365/2005. [↑](#footnote-ref-446)
447. Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36. [↑](#footnote-ref-447)
448. In a merger, Shell would not have to subpoena all of the 4.000-5.000 minority shareholders, unlike as in a squeeze-out procedure (see Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.13). [↑](#footnote-ref-448)
449. Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.9. [↑](#footnote-ref-449)
450. See Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.18 and 3.25, citing the Parliamentary Documents II 1981-1982, 16.453, nr. 6, 6. [↑](#footnote-ref-450)
451. Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.23. [↑](#footnote-ref-451)
452. Commercial Chamber 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.27. [↑](#footnote-ref-452)
453. M. Raaijmakers, “Uitstoting minderheid”, 410; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1174; ; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 856-857. [↑](#footnote-ref-453)
454. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R05/172HR, *JOR* 2007/237, note B.F. Assink, nr. 4.3; Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr. 3.21. See also: P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 138-139. [↑](#footnote-ref-454)
455. President Tribunal of Amsterdam 11 June 1999, Leyinvest/KBB, *JOR* 1999/174, note G. Van Solinge, nr. 5; Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, nr. 3.20; See also: P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 138-139; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 853-854 and 863-864; M. Raaijmakers, “Uitstoting minderheid”, 397. [↑](#footnote-ref-455)
456. Supreme Court 14 September 2007, Centaurus/Versatel, nr. R06/030HR, *JOR* 2007/232. See also: P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 139; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 862-863. [↑](#footnote-ref-456)
457. Tribunal of Amsterdam 6 February 2002, Leyinvest/Vendex/KBB*, JOR* 2002/61, nr. 6-8. [↑](#footnote-ref-457)
458. Commercial Chamber 14 December 2005, Centaurus/Versatel, *JOR* 2006; *AA* 2006, 201, note M. Raaimakers; *Ondernemingsrecht* 2006, 111, note R.M Hermans. [↑](#footnote-ref-458)
459. Commercial Chamber 27 September 2005, Centaurus/Versatel, *JOR* 2005, 272; *ARO* 2005, 182, 3.20; Tribunal of Amsterdam 6 February 2002, Leyinvest/Vendex/KBB*, JOR* 2002/61, nr. 7. See also: P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 139; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 857-862. [↑](#footnote-ref-459)
460. Tribunal of Amsterdam 6 February 2002, Leyinvest/Vendex/KBB*, JOR* 2002/61. [↑](#footnote-ref-460)
461. Commercial Chamber Court of Amsterdam 20 December 2007, Trafalgar/Shell, *JOR* 2008/36, nr. 3.26. [↑](#footnote-ref-461)
462. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 141-142. [↑](#footnote-ref-462)
463. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 141-142. [↑](#footnote-ref-463)
464. P.H.C Van Leeuwen, “De activa/passiva-transactie als uitstotingsmethode”, *V&O* 2011, n° 7/8, (137) 141-142. [↑](#footnote-ref-464)
465. For the post-takeover squeeze-out, there is also the additional requirement of the 90% acceptance rate (see above in part 4.3). [↑](#footnote-ref-465)
466. K. Geens and H. Laga, “Overzicht van rechtspraak vennootschappen (1986-1991), *TPR* 1993, (933) 1035. See however the discussion in the *Fortis* case, where the governance charter required approval by the shareholders’ meeting, which was enforced by the Brussels Court of Appeals: Court of Appeals Brussels 12 December 2008, *TRV* 2009, 67. See for a discussion: X., “De zaak Fortis. Van het arrest van 12 december 2008 tot de algemene vergadering van 11 februari 2009”, *TRV* 2009, 156-158; X., “De zaak Fortis. Van de algemene vergadering van 11 februari 2009 tot die van 28 april 2009”*, TRV* 2009, 429-430. [↑](#footnote-ref-466)
467. C. Van Der Elst, “Squeeze-out en sell-out of uitwringen en opdringen van effecten” in H. De Wulf and C. Van Der Elst (eds.), *De Belgische overnamewetgeving na de hervorming van 2007,* Antwerp, Intersentia, 2008, 331-375; K. Byttebier, and T. Wera, “Modellen van minderheidsbescherming in de wet van 1 april 2007 en haar uitvoeringsbesluiten. Een kritische analyse” in K. Byttebier and T. Wera (eds.), *Actuele evoluties inzake overnames en herstructureringen*, Antwerp, Intersentia, 2014, 177-246; R. Nieuwdorp, and G. Palmaers, “Squeeze-out en sell-out na de inwerkingtreding van de nieuwe overnamewetgeving”, *T.Fin.R.* 2008, 179-209; M. Van Der Haegen, “Les nouvelles dispositions concernant le squeeze-out et le sell-out et la position des actionnaires minoritaires” in R. Feltkamp, B. Feron and G. T’Jonck (eds.), *De nieuwe OBA-wet*, Brussels, Buylant, 2008, 317-361; T. Verhoest, “De 'squeeze-out' en de 'sell-out' onder nieuw recht” in Jan Ronse Instituut (ed.), *Openbaar bod en Transparantie 2007*, Kalmthout, Biblo, 2008, 172-202; M. Duplat, “Le 'squeeze-out' et le 'sell-out' après la loi du 1er avril 2007 sur les offres publiques d'acquisition” in Centre d’études Jean Renauld (ed.), *La réforme de la réglementation sur les offres publiques d'acquisition*, Waterloo, Kluwer, 2007, 249-272; M. Heene, *Squeeze-out (uitkoopbod),* Mechelen, Kluwer, 2012, 57 p. [↑](#footnote-ref-467)
468. J. Lievens, L. De Broe and P. Maselis, *Fusies & splitsingen. Juridisch, fiscal, draaiboeken en modellen*, Ghent, Mys & Breesch, 1993, 200 p.;J. Van Bael, *Fusies en splitsingen*, Deurne, Kluwer, 1993, 528 p.; P. Della Faille, *Fusions, acquisitions et évaluations d’entreprises”*, Brussels, Larcier, 2001, 617 p.; K. Byttebier, *Handboek fusies en overnames*, Antwerp, Intersentia, 2012, 1083 p.; T. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer, 1993, 659 p. [↑](#footnote-ref-468)
469. This was confirmed by conversations with prof. M. Wyckaert, my supervisor and a prominent practitioner. [↑](#footnote-ref-469)
470. This was pointed out to me in conversation with prof. M. Wyckaert. [↑](#footnote-ref-470)
471. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 19. As will be discussed in chapter 8, this is economically inefficient, as it prevents value increasing takeovers from taking place. [↑](#footnote-ref-471)
472. S. Rousseau, “Transics zoekt uitgang Brusselse beurs”, *De Tijd*, 17 January 2013. [↑](#footnote-ref-472)
473. X, “Transics behoudt beursnotering”, *De Tijd*, 26 January 2013. [↑](#footnote-ref-473)
474. S. Verschueren, “Spadel geraakt niet van de beurs”, *De Tijd*, 29 December 2015. [↑](#footnote-ref-474)
475. See: Prospectus concerning the takeover bid by Real Software NV on all the shares and warrants of Dolmen Computer Applications NV, 13 February 2008, <http://www.realdolmen.com/static/files/About%20RealDolmen/Agenda%20en%20beslissingen/Archief2008/DolmenProspectus_N.pdf>; Press announcement on the approval of the merger proposal by the boards of Real and Dolmen, 13 June 2008, <http://www.realdolmen.be/static/news-attachments/fusievoorstel_realdolmen.pdf>. We thank Roel Meers, lawyer at Baker & McKenzie, for bringing this case to our attention and discussing it with us. [↑](#footnote-ref-475)
476. B. Tilleman, “Art. 64 W.Venn.” in H. Braeckmans, K. Geens and E. Wymeersch (eds.), *Vennootschappen en verenigingen. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Kluwer, loose-leaf, 12. [↑](#footnote-ref-476)
477. T. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer 1993, 386; K. Geens and M. Wyckaert, *Verenigingen en vennootschappen, II.A, Algemeen Deel* in *Beginselen van Belgisch Privaatrecht*, Mechelen, Kluwer, 2011, 606. [↑](#footnote-ref-477)
478. It should be noted, however, that cross-borders mergers can never be annulled (article 772/5 Belgian Companies Code). [↑](#footnote-ref-478)
479. B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 71. [↑](#footnote-ref-479)
480. For an overview of the different conceptions, please refer to: T. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer 1993, 415-416; D. Van Gerven, “Moet de aandeelhouder wel stemmen in het vennootschapsbelang?”, *TRV* 2013, 671-672; K. Geens and M. Wyckaert, *Verenigingen en vennootschappen, II.A, Algemeen Deel* in *Beginselen van Belgisch Privaatrecht*, Mechelen, Kluwer, 2011, 262 and following and 604-605; O. Caprasse and R. Aydogdu, “l’abus de droit de vote et ses sanctions” in G.-A. Dal and M. Fyon (eds.), *Le droit des sociétés aujourd’hui: principes, évolutions et perspectives*, Brussels, Editions du jeune barreau de Bruxelles, 2008, (279) 281 and following. [↑](#footnote-ref-480)
481. X. Dieux, “Nouvelles observations sur l’abus de majorité ou de minorité dans les personnes morales fonctionnant selon le principe majoritaire”, *TBBR* 1998, (8) 17-19. [↑](#footnote-ref-481)
482. B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 64; P. Coppens, *L’abus de majorité dans les sociétés anonymes*, Gembloux, Duculot, 1947, 81-83; L. Simont, “Réflexions sur l’abus de minorité” in G. Baert (ed.), *Liber Amicorum Jan Ronse*, Brussels, Story-Scientia, 1986, (307) 323; K. Geens, “De jurisprudentiële bescherming van de minderheidsaandeelhouder tegen door de meerderheid opgezette beschermingsconstructies”, *TRV* 1988, extra edition, 15-16; Y. Merchiers, “La nullité des décisions d’organes de sociétés et en particulier pour violation d’un principe général de droit” (note under Court of Appeals Brussels 13 January 1971, *RCJB* 1973, (269) 280-281. [↑](#footnote-ref-482)
483. T. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer 1993, 416; D. Van Gerven, “Moet de aandeelhouder wel stemmen in het vennootschapsbelang?”, *TRV* 2013, 672 and 604-605; J.-M. Nelissen Grade, “De la validité et l’exécution de la convention de vote dans les sociétés commerciales” (note under Supreme Court 13 April 1989), *RCJB* 1991, (214) 240-241. [↑](#footnote-ref-483)
484. K. Geens and M. Wyckaert, *Verenigingen en vennootschappen, II.A, Algemeen Deel* in *Beginselen van Belgisch Privaatrecht*, Mechelen, Kluwer, 2011, 262; B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 66. [↑](#footnote-ref-484)
485. See for example: P. Coppens, “Du caractère intentionnel de l’abus de majorité”, *RPS* 1955, (292) 292. [↑](#footnote-ref-485)
486. Supreme Court 1 February 1996, *Pas.* 1996, I, 158; Supreme Court 10 September 1971, *RCJB* 1976, 300, note P.Van Ommeslaghe. See also: T. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer 1993, 417-418; D. Van Gerven, “Moet de aandeelhouder wel stemmen in het vennootschapsbelang?”, *TRV* 2013, 672; B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 64; K. Geens, “De jurisprudentiële bescherming van de minderheidsaandeelhouder tegen door de meerderheid opgezette beschermingsconstructies”, *TRV* 1988, extra edition, 42-45. [↑](#footnote-ref-486)
487. D. Van Gerven, “Moet de aandeelhouder wel stemmen in het vennootschapsbelang?”, *TRV* 2013, 672. [↑](#footnote-ref-487)
488. See Court of Commerce Brussels 5 March 1929, *RPS* 1929, 186; Court of Commerce Namur 2 February 1950, *RPS* 1951, 15, note P. Coppens; Court of Commerce Brussels 7 July 1955, *RW* 1955-1956, 251; Court of Commerce Brussels 31 May 1991, *TBH* 1991, 927, note J.-M. Nelissen Grade. See alsoT. Tilquin, *Traité des fusions et scissions*, Brussels, Kluwer 1993, 419; B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 69-70; P. Coppens, *L’abus de majorité dans les sociétés anonymes*, Gembloux, Duculot, 1947, 235-247; and the other case law cited in these sources. [↑](#footnote-ref-488)
489. Court of Commerce Namur 2 February 1950, *RPS* 1951, 15, note P. Coppens. [↑](#footnote-ref-489)
490. B. Tilleman, *De geldigheid van besluiten van de algemene vergadering. Het nieuwe artikel 190bis W.Venn.*, Kalmthout, Biblo, 1994, 70. [↑](#footnote-ref-490)
491. Court of Commerce Brussels 5 March 1929, *RPS* 1929, 186; Court of Commerce Brussels 7 July 1955, *RW* 1955-1956, 251. [↑](#footnote-ref-491)
492. Court of Commerce Brussels 31 May 1991, *TBH* 1991, 927, note J.-M. Nelissen Grade. [↑](#footnote-ref-492)
493. It should be noted that such a clause is only valid in a cooparative corporation, due to a specific provision in the Belgian Companies Code (article 370). [↑](#footnote-ref-493)
494. J.-M. Nelissen Grade, note under Court of Commerce Brussels 31 May 1991, *TBH* 1991, (935) 937. [↑](#footnote-ref-494)
495. Cfr. the approach in the United States, where conflicted transactions are subject to the stringent entire fairness review, while at arm’s length transactions are subject to the more flexible business judgment rule (see above in chapter 3). [↑](#footnote-ref-495)
496. For this idea, see the discussion above in paragraph 12 and further in paragraph 211. [↑](#footnote-ref-496)
497. Cfr. P. Coppens, *L’abus de majorité dans les sociétés anonymes*, Gembloux, Duculot, 1947, 235-247. [↑](#footnote-ref-497)
498. See above in paragraph 21 for the justification of the choice for Delaware. [↑](#footnote-ref-498)
499. Cfr. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841), 887 and 905. [↑](#footnote-ref-499)
500. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 903 and 905. [↑](#footnote-ref-500)
501. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841), 908-912. [↑](#footnote-ref-501)
502. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 911-912. See also: L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 936 and 977. [↑](#footnote-ref-502)
503. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 903. [↑](#footnote-ref-503)
504. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 771. [↑](#footnote-ref-504)
505. K. Geens, “Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het ‘beginsel van de juiste prijs’” in X, *Synthèse de droit bancaire et financier. Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, 451-468. [↑](#footnote-ref-505)
506. K. Geens, “Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het ‘beginsel van de juiste prijs’” in X, *Synthèse de droit bancaire et financier. Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, (451) 454-455. [↑](#footnote-ref-506)
507. K. Geens, “Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het ‘beginsel van de juiste prijs’” in X, *Synthèse de droit bancaire et financier. Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, (451) 454-455. [↑](#footnote-ref-507)
508. Cfr. *Weinberger* in the United States (discussed above in paragraph 81) with article 15(5) of the Takeover Directive in the European Union (discussed above in paragraph 130). [↑](#footnote-ref-508)
509. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 906; T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, (497) 505-507. [↑](#footnote-ref-509)
510. It should be noted, however, that majority of the minority approval alone only shifts the burden of proof of entire fairness to the plaintiff. For the standard of review to shift to the business judgment rule, it is also required that the freeze-out is approved by a special committee of independent directors (see above in paragraph 105). [↑](#footnote-ref-510)
511. T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, (497) 507-509. [↑](#footnote-ref-511)
512. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 845; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 965. [↑](#footnote-ref-512)
513. Cfr. the classification in part 2.1. It should be kept in mind, however, that a freeze-out after a takeover bid by a controlling shareholder should be classified as a (two-step) going-private freeze-out, and not as a post-acquisition freeze-out, where the takeover bid is launched by an independent bidder. [↑](#footnote-ref-513)
514. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 878; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 956-957 and 961; E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 223-224. [↑](#footnote-ref-514)
515. On the distinction between standards and rules in general, see: L. Kaplow, “Rules versus standards: an economic analysis”, *Duke Law Journal* 1992, 557-629: J. Armour, H. Hansmann, R. Kraakman, “Agency problems and legal strategies” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (35) 39-40. [↑](#footnote-ref-515)
516. L. Kaplow, “Rules versus standards: an economic analysis”, *Duke Law Journal* 1992, (557) 577-579, 611 and 622-623. [↑](#footnote-ref-516)
517. On the use of gatekeepers as a mechanism of enforcement, see: Cfr. J. Armour, H. Hansmann, R. Kraakman, “Agency problems and legal strategies” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (35) 48-49. [↑](#footnote-ref-517)
518. Indeed, in such cases, the business judgment rule applies (see above in paragraph 105). However, to be complete, it should be noted that the independent directors always hire independent experts to provide their opinion on the price. [↑](#footnote-ref-518)
519. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 882. [↑](#footnote-ref-519)
520. Cfr. J. Armour, H. Hansmann, R. Kraakman, “Agency problems and legal strategies” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (35) 47; E. Rock, P. Davies, H. Kanda and R. Kraakman, “Fundamental changes” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (183) 223. [↑](#footnote-ref-520)
521. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 915. Cfr. also L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 961. [↑](#footnote-ref-521)
522. Cfr. Ventoruzzo: *“As such, it* [a standard] *would probably be less easily and effectively applied in continental civil law systems than in common law systems where the accumulation of precedents contributes to specifying the content of the requirement.”* See M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 907. [↑](#footnote-ref-522)
523. M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 915. [↑](#footnote-ref-523)
524. Singer, 980. [↑](#footnote-ref-524)
525. M. Raaijmakers, “Uitstoting minderheid”, 399, 404 and 410. [↑](#footnote-ref-525)
526. E.B. Rock, “Corporate law doctrine and the legacy of American Legal Realism”, *University of Pennsylvania Law Review* 2015, (2019) 2035-2036. [↑](#footnote-ref-526)
527. M. Raaijmakers, “Uitstoting minderheid”, 410; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1174. [↑](#footnote-ref-527)
528. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, (785) 831. [↑](#footnote-ref-528)
529. See for example: M. Raaijmakers, “Uitstoting minderheid”, 405 and 410; W.B. Kuijpers and A. van der Krans, “De positie van minderheidsaandeelhouders en het openbaar bod”, *O&F* 2014, (19) 28-30; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1172 and 1174; E.H. Rebers and R.H. Maatman, “De rol van aandeelhouders bij een openbaar bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (375) 396-397; P.J. van der Korst, “Minderheidsaandeelhouders na een geslaagd bod” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (853) 867. [↑](#footnote-ref-529)
530. Cfr. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis”, *Stanford Law Review* 1976, 487-519. [↑](#footnote-ref-530)
531. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-531)
532. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, 1354-1376. [↑](#footnote-ref-532)
533. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1329-1330; L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1700-1701. [↑](#footnote-ref-533)
534. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808; L.A. Bebchuk, “The sole owner standard for takeover policy”, *The Journal of Legal Studies* 1988, 197-229. [↑](#footnote-ref-534)
535. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1702. [↑](#footnote-ref-535)
536. A. Schwarz, “The fairness of tender offer prices in utilitarian theory”, *The Journal of Legal Studies* 1988, 165-196; A. Schwarz, “The sole owner standard reviewed”, *The Journal of Legal Studies* 1988, 231-235. [↑](#footnote-ref-536)
537. L.A. Bebchuk, “The sole owner standard for takeover policy”, *The Journal of Legal Studies* 1988, (197) 205-207. [↑](#footnote-ref-537)
538. L.A. Bebchuk, “The sole owner standard for takeover policy”, *The Journal of Legal Studies* 1988, (197) 207-210, and the sources cited there. [↑](#footnote-ref-538)
539. S.J. Grossman and O.D. Hart, “Takeover bids, the free-rider problem and the theory of the corporation”, *The Bell Journal of Economics* 1980, 42-64. [↑](#footnote-ref-539)
540. In reality, the situation is not so extreme because shareholders have divergent valuations of the company, due to differences in risk preference and in information, cfr. S.J. Grossman and O.D. Hart, “Takeover bids, the free-rider problem and the theory of the corporation”, *The Bell Journal of Economics* 1980, (42) 45. In addition, if takeover bids fail with certainty, shareholders would randomize their strategy, cfr. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1331. [↑](#footnote-ref-540)
541. S.J. Grossman and O.D. Hart, “Takeover bids, the free-rider problem and the theory of the corporation”, *The Bell Journal of Economics* 1980, (42) 44-45. [↑](#footnote-ref-541)
542. Takeover bids are often conditional on reaching a certain threshold of shares. In this case, we assume that this threshold is 50%, enough to have control over the company and effectuate a freeze-out in the United States. “Failure” of the bid means that this threshold was not reached. We also assume that if the bidder does not reach this threshold, he does not buy any shares at all. The opposite option, that the bidder still buys the shares from the shareholders that have accepted the bid, is also possible and does not change the conclusion of the model. [↑](#footnote-ref-542)
543. This is the value of the shares for the individual shareholder after a succesful takeover bid. [↑](#footnote-ref-543)
544. S.J. Grossman and O.D. Hart, “Takeover bids, the free-rider problem and the theory of the corporation”, *The Bell Journal of Economics* 1980, (42) 45-47. [↑](#footnote-ref-544)
545. See, *inter alia*: Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, 1325-1344; M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 30 p.; G.K. Yarrow, “Shareholder protection, compulsory acquisition and the efficiency of the takeover process”, *The Journal of Industrial Economics* 1985, 3-16; M. Bagnoli, and B.L. Lipman, “Succesful takeovers without exclusion”, *The Review of Financial Studies* 1988, 89-110; A.R. Gomes, “Takeovers, freezeouts and risk arbitrage”, *PIER Working Paper nr. 01-027 and University of Pennsylvania Law School ILE Research Paper 01-10*, March 2001, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277109>, 46 p.; L.A. Bebchuk and O.D. Hart, “Takeover bids vs. proxy fights in contests for corporate control”, *The Harvard John M. Olin Discussion Paper Series*, nr. 336 10/2001, available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf>, 39 p. [↑](#footnote-ref-545)
546. G.K. Yarrow, “Shareholder protection, compulsory acquisition and the efficiency of the takeover process”, *The Journal of Industrial Economics* 1985, 3-16; Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, 1325-1344; L.A. Bebchuk and O.D. Hart, “Takeover bids vs. proxy fights in contests for corporate control”, *The Harvard John M. Olin Discussion Paper Series*, nr. 336 10/2001, available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf>, 39 p.; M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 11 and 18; A.R. Gomes, “Takeovers, freezeouts and risk arbitrage”, *PIER Working Paper nr. 01-027 and University of Pennsylvania Law School ILE Research Paper 01-10*, March 2001, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277109>, 46 p. [↑](#footnote-ref-546)
547. G.K. Yarrow, “Shareholder protection, compulsory acquisition and the efficiency of the takeover process”, *The Journal of Industrial Economics* 1985, 3-16. [↑](#footnote-ref-547)
548. A.R. Gomes, “Takeovers, freezeouts and risk arbitrage”, *PIER Working Paper nr. 01-027 and University of Pennsylvania Law School ILE Research Paper 01-10*, March 2001, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277109>, 46 p. [↑](#footnote-ref-548)
549. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, 1325-1344. [↑](#footnote-ref-549)
550. A.R. Gomes, “Takeovers, freezeouts and risk arbitrage”, *PIER Working Paper nr. 01-027 and University of Pennsylvania Law School ILE Research Paper 01-10*, March 2001, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=277109>, 46 p. [↑](#footnote-ref-550)
551. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1335. [↑](#footnote-ref-551)
552. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1333. [↑](#footnote-ref-552)
553. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1340-1342. [↑](#footnote-ref-553)
554. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1327 and 1338 [↑](#footnote-ref-554)
555. M.J. Fishman, “Preemptive bidding and the role of the medium of exchange in acquisitions”, *Journal of Finance* 1989, 41-57. [↑](#footnote-ref-555)
556. Indeed, the possibility of future takeover premia would cause the pre-bid market price to rise above the current valuation of the company by the shareholders. However, a bid should succeed from the moment when the bid price is higher than the current valuation of the company by the shareholders, even if the latter is lower than the pre-bid market price. Therefore, there are soms bids that should succeed at a bid price that is lower than the pre-bid market price (a negative takeover premium). See Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1338-1339. [↑](#footnote-ref-556)
557. Y. Amihud, M. Kahan and R.K. Sundaram, “The foundation of freeze-out laws in takeovers”, *The Journal of Finance* 2004, (1325) 1327 and 1339. [↑](#footnote-ref-557)
558. Winter Report, 60; TOBD Assessment Report, 275 and 314. See also: M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 11 and 18; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 7. [↑](#footnote-ref-558)
559. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 11 and 18; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 7. [↑](#footnote-ref-559)
560. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 19; C. Van der Elst and L. Van den Steen, “Opportunities in the M&A Aftermarket: Squeezing Out and Selling Out”, *Universiteit Gent Financial Law Institute Working Paper* No. 2006-12, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933609>, 12. [↑](#footnote-ref-560)
561. The disinterested shareholders are all the shareholders that are not affiliated with the bidder. The bidder and its affiliates are not taken into account to determine whether the threshold is reached, because they have every incentive to engage in self-dealing and set the price as low as possible, contrary to the interests of the other shareholders. [↑](#footnote-ref-561)
562. Cfr. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1702 and 1759-1761. [↑](#footnote-ref-562)
563. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808; L.A. Bebchuk, “The pressure to tender: an analysis and a proposed remedy”, *Delaware Journal of Corporate Law* 1987, 911-949. For a critique of these papers, see: A. Schwarz, “The fairness of tender offer prices in utilitarian theory”, *The Journal of Legal Studies* 1988, 165-196; A. Schwarz, “The sole owner standard reviewed”, *The Journal of Legal Studies* 1988, 231-235. For a reply to this critique, see: L.A. Bebchuk, “The sole owner standard for takeover policy”, *The Journal of Legal Studies* 1988, 197-229. [↑](#footnote-ref-563)
564. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1713. See for empirical evidence: M. Bradley, “Interfirm Tender Offers and the Market for Corporate Control”, *Journal of Business* 1980,345-376. [↑](#footnote-ref-564)
565. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1747-1752. [↑](#footnote-ref-565)
566. However, Bebchuk and Hart have argued that the vote-like mechanism does exist in American legal practice, due to the omnipresent “poison pills”, which allow the board of a company that is the target of a hostile tender offer to block the tender offer. Therefore, a hostile bidder to replace the board through a proxy contest, which leads to a shareholder vote, like under the vote-like mechanism of Bebchuk. See L.A. Bebchuk and O.D. Hart, “Takeover bids vs. proxy fights in contests for corporate control”, *The Harvard John M. Olin Discussion Paper Series*, nr. 336 10/2001, available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf>, 4 and 32-33. Nevertheless, this has some disadvantages, as a proxy contest is very costly. In addition, a poison pill does not require a shareholder vote in case of a friendly tender offers. [↑](#footnote-ref-566)
567. A. Schwarz, “The fairness of tender offer prices in utilitarian theory”, *The Journal of Legal Studies* 1988, (165) 179-183. [↑](#footnote-ref-567)
568. L.A. Bebchuk, “The sole owner standard for takeover policy”, *The Journal of Legal Studies* 1988, (197) 223-228. [↑](#footnote-ref-568)
569. Winter Report, 62; TOBD Assessment Report, 220, 276 and 314. See also: M. Ventoruzzo, “Freeze-outs: transcontinental analysis and reform proposals”, *Virginia Journal of International Law* 2010, (841) 893, footnote 164; M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 20-21. [↑](#footnote-ref-569)
570. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 321. [↑](#footnote-ref-570)
571. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 3 and 21-22; P. Davies and K. Hopt, “Control transactions” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (225) 256 and 265. [↑](#footnote-ref-571)
572. M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 3 and 21-22. [↑](#footnote-ref-572)
573. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1740-1742. Limiting the duration that the sell-out right can be exercised does not solve this problem, as shareholders could still wait until the result of the bid is announced to exercise their sell-out right. [↑](#footnote-ref-573)
574. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1750-1752. [↑](#footnote-ref-574)
575. TOBD Assessment Report, 320. [↑](#footnote-ref-575)
576. L.A. Bebchuk and O.D. Hart, “Takeover bids vs. proxy fights in contests for corporate control”, *The Harvard John M. Olin Discussion Paper Series*, nr. 336 10/2001, available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf>, 39 p. See also earlier in: L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, 1693-1808. [↑](#footnote-ref-576)
577. L.A. Bebchuk and O.D. Hart, “Takeover bids vs. proxy fights in contests for corporate control”, *The Harvard John M. Olin Discussion Paper Series*, nr. 336 10/2001, available at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/336.pdf>, 24-25. [↑](#footnote-ref-577)
578. See for a comparison of both: L. Cohen, “Holdouts and free riders”, *The Journal of Legal Studies* 1991, 351-362; L. Cohen, “Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling”, *The Journal of Legal Studies* 1990, (113) 120-125. This problem is also (implicitly) mentioned in P. Davies and K. Hopt, “Control transactions” in R. Kraakman, J. Armour, P. Davies, L. Enriques and H. Hansmann (eds.), *The anatomy of corporate law. A comparative and functional approach*, Oxford, Oxford University Press, 2009, (225) 263-264; M. Burkart and F. Panunzi, “Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process”, *ECGI Working Paper Series in Law,* nr. 10/2003, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=420940>, 17-18; TOBD Assessment Report, 315; Winter Report, 60. [↑](#footnote-ref-578)
579. L. Cohen, “Why Tender Offers? The Efficient Market Hypothesis, the Supply of Stock, and Signaling”, *The Journal of Legal Studies* 1990, (113) 123-124 and especially footnote 23. [↑](#footnote-ref-579)
580. Cfr. L.A. Bebchuk, “Toward undistorted choice and equal treatment in corporate takeovers”, *Harvard Law Review* 1985, (1693) 1702 and 1759-1761. [↑](#footnote-ref-580)
581. Making abstraction from possible alternative freeze-out techniques in other countries (see above in paragraph 126). [↑](#footnote-ref-581)
582. K. Geens, “Hoe het vennootschapsrecht zich met een reverse take over verweert tegen een overnamepoging door het ‘beginsel van de juiste prijs’” in X, *Synthèse de droit bancaire et financier. Liber Amicorum André Bruyneel*, Brussels, Bruylant, 2008, 451-468. [↑](#footnote-ref-582)
583. S. Grundmann, *European company law: organization, finance and capital markets*, Antwerpen, Intersentia, 2012, 675 and 790-791. [↑](#footnote-ref-583)
584. Cfr. also: M. Raaijmakers, “Uitstoting minderheid”, 410; M. Raaijmakers and P.A. van der Schee, “Regulering en handhaving van overnamebiedingen in perspectief” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (1125) 1174. [↑](#footnote-ref-584)
585. M. Raaijmakers, “Uitstoting minderheid”, 382. That is, if the view of the shareholders as a financial investor is accepted, as we argue in paragraph 211 and 246 above. [↑](#footnote-ref-585)
586. Cfr. also: T. Kaisanlahti, “When is a tender price fair in a squeeze-out?”, *European Business Organization Law Review* 2007, (497) 501 and 505-509. [↑](#footnote-ref-586)
587. J.-M. Nelisse Grade, “Het vrijwillig openbaar overnamebod” in Jan Ronse Instituut (ed.), *Openbaar bod en transparantie 2007,* Kalmthout, Biblo, 2008, (11) 51. [↑](#footnote-ref-587)
588. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354), 1359-1365. [↑](#footnote-ref-588)
589. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 762-763; G. Subramanian, “Post‐*Siliconix* Freeze‐Outs: Theory and Evidence”, *The Journal of Legal Studies* 2007, (1) 9, footnote 6; V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1361-1362; E.F. Greene, “Corporate Freeze-out Mergers: A Proposed Analysis ”, *Stanford Law Review* 1976, (487) 448 and 509. [↑](#footnote-ref-589)
590. V. Brudney and M.A. Chirelstein, “A restatement of corporate freezeouts”, *The* *Yale Law Journal* 1978, (1354) 1359 and 1367. [↑](#footnote-ref-590)
591. F.A. Gevurtz, *Corporation law*, St. Paul, West, 2000, 764-765; L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 974-975. [↑](#footnote-ref-591)
592. L. Pinta, “The U.S. and Italy: controlling shareholders’ fiduciary duties in freeze out mergers and tender offers”, *NYU Journal of Law & Business* 2011, (931) 974-975. [↑](#footnote-ref-592)
593. M. Raaijmakers, “Uitstoting minderheid”, 378 and 381-382; P.D. Olden, “Uitstoting- en verkoopprocedure” in M.P. Nieuwe Weme, G. van Solinge, R.P. ten Have and L.J. Hijmans van den Bergh (eds.), *Handboek openbaar bod*,Deventer, Kluwer, 2008, (835) 837. [↑](#footnote-ref-593)
594. R.J. Gilson, and J.N. Gordon, “Controlling Controlling Shareholders”, *University of Pennsylvania Law Review* 2003, 785-843; G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, 2-70. [↑](#footnote-ref-594)
595. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 49-52. [↑](#footnote-ref-595)
596. In theory, hostile tender offers are possible and do not require board approval. However, Subramanian notes that the practice of “poison pills” makes tender offers without board approval very difficutl, although not completely impossible. See: G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 49 and 51. [↑](#footnote-ref-596)
597. G. Subramanian, “Fixing Freezeouts”, *Yale Law Journal* 2005, (2) 50. See also the opinion of Vice Chancellor Strine in *Cox Communications*,discussed above in paragraph 106. [↑](#footnote-ref-597)
598. We would argue that this more stringent standard of review is a better idea than a complete prohibition if the conditions are not fulfilled, as otherwise the special committee of independent directors could block the deal entirely and the majority shareholders would have no walk-away alternative. [↑](#footnote-ref-598)
599. L. Kaplow and S. Shavell, “Why the legal system is less efficient than the income tax in redistributing income”, *The Journal of Legal Studies* 1994, (557) 621-622. [↑](#footnote-ref-599)
600. For a short application of the pressure to tender problem to Belgian takeover law, see: T. Vos, “Pressure to tender in Belgian takeover law”, *Interdisciplinary Matters* 2014-2015, available online: <https://www.tilburguniversity.edu/upload/b66f6456-6e87-4dab-8469-7f4e0ea9c48e_Interdisciplinary%20Matters%20vol.1%2C%202014-2015.pdf>, 120-126. [↑](#footnote-ref-600)